98-79 (1)

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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October Term, 1998

KRISTOPHER SELLERS, by his parents Alan and Sherri Sellers and
ALAN and SHERRI SELLERS,
Petitioners,
v.

THE SCHOOL BOARD OF THE CITY OF MANASSAS, VIRGINIA and
JAMES E. UPPERMAN, SUPERINTENDENT OF THE SCHOOL BOARD OF THE CITY OF MANASSAS, VIRGINIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether monetary damages are available under Section 504 of the Rehabilitation Act (§504) separately and in conjunction with 42 U.S.C.§ 1983, when a school district has violated the civil rights of a qualified citizen and federal statutes by refusing to evaluate and offer a free appropriate public education to that citizen?

Whether monetary damages are available under the Individuals with Disabilities Education Act separately and in conjunction with 42 USC § 1983, when a school district has violated the civil rights of a qualified citizen and federal statutes by refusing to continously evaluate and provide a free appropriate public education to that citizen?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

A. FACTUAL BACKGROUND 6

B. PROCEDURAL HISTORY 7

REASONS FOR GRANTING THE WRIT 9

I. AFFIRMATIVE ACTION ON THE PART OF A SCHOOL SYSTEM THAT DENIES A DISABLED STUDENT A FREE AND APPROPRIATE

EDUCATION AND FAILS TO INFORM PARENTS OF DUE PROCESS RIGHTS, AS GUARANTEED UNDER THE IDEA, CAN BE DISTINGUISHED FROM EDUCATIONAL MALPRACTICE AND VIOLATES THE CIVIL RIGHTS OF THAT STUDENT, THUS FORMING A BASIS FOR AN ACTION DIRECTLY UNDER THE IDEA. 11

II. THE DECISION OF THE FOURTH CIRCUIT THAT AFFIRMATIVE ACTION BY THE SCHOOL DISTRICT IN REFUSING REQUESTS FOR EVALUATION DOES NOT VIOLATE SECTION 504 OF THE REHABILITATION ACT WHEREBY DAMAGES ARE AVAILABLE, CONFLICTS WITH DECISIONS OF OTHER COURTS. 16

III. THE FOURTH CIRCUIT'S DECISION TO PROHIBIT COMPENSATORY AND PUNITIVE DAMAGES UNDER 42 U.S.C. §1983 IN CONJUNCTION WITH THE IDEA CONFLICTS WITH CONSTITUTIONAL PROTECTION AGAINST STATE ACTION, DECISIONS OF OTHER COURTS OF APPEAL, AND CONGRESSIONAL INTENT. 18

CONCLUSION 25

APPENDIX A1

TABLE OF AUTHORITIES

CASES

Gebser v. Lago Vista Independent School Dist., ____ U.S. ___ ; No. 96-1866 (*decided* June 22, 1998). 21, 22

Franklin v. Gwinett County Pub. Sch., 503 U.S. 60 (1992). 9, 21

Smith v. Robinson, 468 U.S. 992 (1984). 22

Pennhurst State Sch. and Hosp. v. Halderman, 441 U.S. 1 (1981). 21

Middlesex County Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). 21

Maine v. Thiboutot, 448 U.S. 1 (1980). 21

Sellers v. School Bd of Manassas, Va., 141 F.3d 524 (4th Cir.1998). 8, 11, 14

Commonwealth of Va. Dep't. of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997). 19

W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995). 9, 15, 16, 17, 18, 23, 24

Rogers v. Magnet Cove Pub. Sch., 34 F.3d 642 (8th Cir.) (1994). 9

Angela L. v. Pasadena Indep. Sch. Dist., 918 F.2d 1188 (5th Cir. 1990) 24

Hall by Hall v. Vance County Bd. of Ed., 774 F.2d 629 (4th Cir. 1985). 15

Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982). 16

Sellers v. School Bd. of Manassas, Va., 960 F. Supp. 1006 (E.D.Va. 1997). 8

Emma C. v. Eastin, 985 F. Supp. 940 (N.D. Cal. 1997). 15

Walker v. District of Columbia, 969 F. Supp. 794 (D.D.C. 1997). 10, 16, 24

Brantley v. Independent Sch. Dist No. 625, 936 F. Supp. 649 (D. Minn. 1996). 10

Whitehead by and through Whitehead v. School Bd. For Hillsborough County, 918 F. Supp. 1515 (M.D. Fla. 1996). 10

Woods v. New Jersey Dep't of Educ., 796 F. Supp. 767 (D.N.J. 1992). 10

CONSTITUTIONAL PROVISIONS

United States Constitution, amend. XIV 8

STATUTES AND REGULATIONS

20 U.S.C. §1412; 34 C.F.R. §300.125 ..... 12, 18

20 U.S.C. §1415(l); 34 C.F.R.§ 300.512(d) 20, 23

20 U.S.C. §1415(m); 34 C.F.R. §300.517 6

20 U.S.C. §1415(i)(2)(A); 34 C.F.R. §300.512 6

29 U.S.C. 790; §504 ..... 5 (throughout)

42 U.S.C. §1983 ..... 5 (throughout)

HOUSE AND SENATE REPORTS

H.R. Rep. No. 99-296, 99th Cong., 1st Sess. (1985). 9, 20

H.R. Conf. Rep. No. 99-687 (1986), reprinted in U.S.C.C.A.N. 1807. 20

Congressional Record, Vol. 131, 21387, 21389 (July 30, 1985) 22, 23

No. 1

In The SUPREME COURT OF THE UNITED STATES
October Term, 1998

KRISTOPHER SELLERS, by his parents Alan and Sherri Sellers and
ALAN and SHERRI SELLERS,
Petitioners,
v.

THE SCHOOL BOARD OF THE CITY OF MANASSAS, VIRGINIA and
JAMES E. UPPERMAN, SUPERINTENDENT OF THE SCHOOL BOARD OF THE CITY OF MANASSAS, VIRGINIA,
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PETITION FOR A WRIT OF CERTIORARI

Kristopher Sellers, through his parents, Alan and Sherri Sellers, and Alan and Sherri Sellers petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case on April 13, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals of the Fourth Circuit is reported at 141 F.3d 524. The opinion of the District Court is reported at 969 F. Supp. 794. The Administrative Hearing before the State Review Board went unreported, *in re Sellers,* (Va., Sept. 6, 1996) (determination). The Administrative Hearing before the local hearing officer went unreported, *in re Sellers*, (Manassas, Va., June 3, 1996)(determination).

JURISDICTION

Subject matter jurisdiction provides for judicial review and review of IDEA disputes; § 504 of the Rehabilitation Act of 1973; and review 42 U.S.C. §1983 protecting citizens against state action depriving them of rights secured by the Constitution and federal statutes.

Appellate jurisdiction exists as a matter of right. 28 U.S.C. § 1291 and FRAP 4. Judgment of the Court of Appeals was entered on April 13, 1998. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

I. U.S. Const. amend. XIV; text appears in Petitioners Appendix, page A52

No. 3

STATUTORY PROVISIONS INVOLVED

I. 42 U.S.C. §1983 (1871), *as amended by* Act December 29, 1979; text appears in Petitioners Appendix, page A52.

II. The Rehabilitation Act of 1973 §504, 29 U.S.C. § 790 (1994); text appears in Petitioners Appendix, page A52.

III. Individuals With Disabilities Education Act (formerly The Education for All Handicapped Children Act) (1975) , as amended by Act of June 4, 1997, 20 U.S.C. § 1412; 34 C.F.R. §300.125; text appears in Petitioners Appendix, page A52.

IV. Individuals With Disabilities Education Act (formerly The Education for All Handicapped Children Act) (1975), as amended by Act of June 4, 1997, 20 U.S.C. §1415(l)(formerly §1415(f)); 34 C.F.R. 300.512 (d); text appears in Petitioners Appendix, page A53.

V. Individuals with Disabilities Education Act (formerly the Education for All Handicapped Children Act) (1975), as amended by Act of June 4, 1997, 20 U.S.C. §1415(m); 34 C.F.R. §300.517; text appears in Petitioners Appendix, page A53.

VI. Individuals with Disabilities Education Act (formerly the Education for All Handicapped Children Act) (1975), as amended by Act of June 4, 1997, 20 U.S.C. § 1415 (i)(2)(A); text appears in Petitioners Appendix, page A54.

STATEMENT OF THE CASE

In 1985, petitioner Kristopher Sellers entered the Manassas City School System (MCPS). In 1986, petitioner's parent, Sherri Sellers requested assistance from MCPS because her son was unexplicably having academic problems. MCPS told Mrs. Sellers that Kristopher's academic problems were not related to any disability qualifying him for special education. MCPS came to that conclusion without testing Kristopher, without evaluating him, without assessing him, indeed they took no action to clinically analyze Kristopher prior to reaching their conclusion.

Subsequently, Kristopher continued to have academic problems. The Sellers continued to press MCPS to help their son. For ten years the Sellers unsuccessfully sought assistance from MCPS.

Throughout this entire period, MCPS never tested Kristopher, MCPS never identified Kristopher, MCPS never provided Kristopher with an appropriate education, MCPS never informed the Sellers of their rights under §504 of the Rehabilitation Act of 1973 (§ 504) or the Individuals with Disabilities Education Act (IDEA).

Finally, with every door closed to the Sellers, they sought advice from counsel to help their son. The school district responded by bringing truancy charges against Kristopher. Only after the truancy charges brought by MCPS were dismissed and the Seller's had retained counsel, did MCPS finally begin to comply with federal law.

On advice of counsel, the Seller's had Kristopher privately tested and evaluated. The tests showed Kristopher to be a student with learning disabilities and emotional

disturbance. Counsel presented these findings to MCPS in order to accelerate the process and get Kristopher into an appropriate school setting. Counsel offered to mediate a settlement *in lieu* of pursuing a due process hearing. As a result of counsel's actions and the findings of the independent evaluations, MCPS agreed to fund and place Kristopher's placement at a full-time, special education private school with related services in order to meet his educational needs.

After resolving the immediate educational issues, the Sellers tried to address the issue of past discrimation and deprivation of constitutional and statutory rights. MCPS's gross misjudgment, bad faith, systematic denial of rights secured under the 14th amendment of the U. S. Constitution, and guaranteed under §504, and IDEA deprived Kristopher of an appropriate education for ten years. MCPS could not remedy this deprivation merely through compensatory education. Consequently the Seller's sought compensatory and punitive damages to recitify years of bad faith, gross misjudgment and purposeful, systematic deprivation of a free and appropriate public education. When MCPS refused to settle the issue of damages the Sellers asked for a due process hearing where they were told the hearing officer had no authority to award damages. The Sellers appealed to the district court. Petitioners contend that damages are available, under § 504, the IDEA, and 42 U.S.C. § 1983 (§ 1983), to citizens who have been deprived of the statutorily protected right to an appropriate education, in order to prevent school systems from perpetuating further abuses against similarly situated citizens.

A. Factual Background

Kristopher Sellers is an eighteen year old male diagnosed with learning and emotional disabilities.[1] Despite being enrolled in MCPS since 1985, Kristopher received no special education services from MCPS prior to the 1995-1996 school year, and then only after Ms. Sellers retained counsel to aid in the process of ensuring her son's rights under the IDEA and §504 of the Rehabilitation Act.

Sherri Sellers, Kristopher's mother, requested assistance with her son's educational needs from his enrollment in first grade in 1986 when it became apparent that Kristopher was not performing at age or grade appropriate levels. MCPS consistently refused to perform the necessary evaluations, stating that he was not in need of such services, despite the fact that from as early as fourth grade standardized test scores demonstrated that he was in need of further evaluation.

After petitioner hired independent educational experts, a clinical psychologist and a learning disabilities expert, MCPS acknowledged that Kristopher was both learning disabled and emotionally disturbed. Instead of providing appropriate educational services, MCPS

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[1] 20 U.S.C. § 1415 (m) provides that states have the option of transferring rights to the disabled child when that child has reached the age of majority. This is not a mandatory transfer and the public agency has the duty to notify that the parents rights have been transferred to their child. This was not done in this case. This is a new provision in IDEA -- the new regulations have not been implemented yet. Additionally, 20 U.S.C. § 1415 (i)(2)(A) permits any aggrieved party, including parents such as the Sellers, to bring a civil action at any time.

requested that a truancy petition be brought against Kristopher. The petition was dismissed in the Juvenile and Domestic Relations Court of Prince William County on March 29, 1996.

Contrary to their previously long held position that he was ineligible for special education services, in 1995 MCPS admitted that Kristopher was a disabled child, entitled to the benefits of the IDEA and §504 . MCPS agreed to fund a full-time private school where he would receive appropriate special education services.

B. Procedural History

Following the settlement agreement as to educational services provided by MCPS, numerous teleconference due process hearings at the administrative law level were held on the issue of the authority of a hearing officer to award compensatory and punitive damages. In an addendum to pre-hearing reports, the hearing officer determined that this issue was beyond the scope of his authority.

At the State Review on October 10, 1996, the hearing officer stated that it would be appropriate for hearing officers to have this authority, but found that no such authority existed. Both hearing officers concluded that all educational issues had been settled between the parties, that the child was disabled and entitled to the benefits of the IDEA and § 504. The only issue contested was the authority to award compensatory and punitive damages.

This issue was brought before the District Court for the Eastern District of Virginia. In a memorandum opinion issued on April 30, 1997, the petitioner's claim was

dismissed. The court dismissed the IDEA claim for damages, stating that the only damages available under the IDEA are restitution or reimbursement. However, under an analysis of the § 504 claim the court stated, "In sharp contrast to the IDEA, it is well-established that monetary damages are an available remedy under §504," yet the court dismissed the plaintiffs' claim. *Sellers v. School Bd. of the City of Manassas, Virginia*, 960 F. Supp. 1006, 1010; 25 IDELR 1071, 1072 (E.D. Va. 1997)(internal cite omitted). The petitioner's claim under §1983 was not analyzed and failed simply because the IDEA claim and the §504 claim were dismissed. Constitutional claims were similarly dismissed.

On appeal, the Fourth Circuit dismissed the IDEA claim for damages, stating that "their claim is indistinguishable from one of educational malpractice." *Sellers v. School Bd., City of Manassas*, 141 F.3d 524 (4th Cir. 1998). Although dismissing the §504 claim for damages, the court recognizes that "either bad faith or gross misjudgment should be shown before a §504 claim can be made out, at least in the context of education of handicapped children." *Id., quoting Monahan*, 687 F.2d 1164, 1171 (8th Cir. 1982). The court found, however, that MCPS' conduct did not constitute anything more than negligence. Finally, the court summarily dismissed the petitioner's claim under 42 U.S.C. §1983, stating that "because the IDEA provides a comprehensive remedial scheme for violations of its own requirements, we hold that parties may not sue under section 1983 for an IDEA violation." Sellers, 141 F.3d 524 (4th Cir. 1998).

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's holding in this case conflicts with principles established in Supreme Court decisions concerning the universal availability of damages under the Fourteenth Amendment and 42 U.S.C. § 1983, as well as principles concerning damages specific to the IDEA, §504, and §1983 established in both the Third and Eighth Circuits. *Franklin v. Gwinnet County Pub. Sch.*, 503 U.S. 60. 70-71 (1992)(holding that there is a presumption of availability of all appropriate remedies for violations of federal statutes unless expressly precluded); *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995)(holding monetary damages available under §504 and availability of monetary damages under 42 U.S.C. §1983 in conjunction with IDEA and §504); *Rogers v. Magnet Cove Public Schools*, 34 F.3d 642-645 (8th Cir. 1994)(holding that Rehabilitation Act incorporates remedies for Title VI for §504 cases) .

The Fourth Circuit has held that §1983 claims are not available in conjunction with IDEA violations. As it now stands, this decision is contrary to the legislative intent of the IDEA, where Congress made it clear that it is their intent "to permit parents or guardians to pursue the rights of handicapped children through [the IDEA], §504, and §1983..." H.R. Rep. No. 99-296, 99th Cong., 1st Sess. 4 (1985), an interpretation which has been followed by the Third and Eighth Circuits.

Similarly, the Fourth Circuit has held that the refusal to evaluate a student despite repeated requests from a parent does not constitute intentional discrimination under §504. This too is in conflict with a decision in the Third Circuit. *Matula*, 67 F.3d at 487. In *Matula*, the court held,

under remarkably similar circumstances, that ignoring parental requests for evaluation violated both §504 and the IDEA, and permitted an action under 42 U.S.C. §1983.[2]

As a result of these conflicts,[3] it is unclear what remedies are available to individuals who have been denied their rights as a result of prolonged, repeated violations of the IDEA and §504 . It is also unclear what sanctions a school system that affirmatively denies the statutorily mandated right to an appropriate education will face as a result of their conduct.

The Fourth Circuit's decision is contrary both to the intent of Congress and the decisions of other courts. Review by this court is warranted.

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[2] In *Matula*, as in the present case, the parents sought damages for the persistent refusal of school officials to evaluate, identify, and provide services to a student suspected of having learning disabilities, neglected to provide parents with information concerning due process procedures or possible entitlement to special education services.

[3] Several district court cases have resulted in conflicting decisions. *See, Walker v. District of Columbia Public Schools*, 969 F. Supp. 1006 (D.D.C.1997)(holding monetary damages available under §504, and IDEA in conjunction with 42 U.S.C. §1983); *Woods v. New Jersey Dept. Of Educ.*, 796 F. Supp 767, 774 (D.N.J. 1992)(finding compensatory and punitive damages available in §1983 action for IDEA violations). *But see, Whitehead by and through Whitehead v. School Bd. for Hillsborough County*, 918 F.Supp. 1515, 1519 (M.D. Fla.1996)(holding compensatory and punitive damages unavailable); *Brantely v. Independent Sch. Dist.No. 625*, 936F.Supp 649 (D.Minn.1996)(holding damages not available for failure to evaluate under IDEA).

I. AFFIRMATIVE ACTION ON THE PART OF A SCHOOL SYSTEM THAT DENIES A DISABLED STUDENT A FREE AND APPROPRIATE EDUCATION AND FAILS TO INFORM PARENTS OF DUE PROCESS RIGHTS, AS GUARANTEED BY THE IDEA, CAN BE DISTINGUISHED FROM EDUCATIONAL MALPRACTICE AND VIOLATES THE CIVIL RIGHTS OF THAT STUDENT, THUS FORMING A BASIS FOR AN ACTION DIRECTLY UNDER THE IDEA.

While the 4th Circuit notes[4] that Kris Sellers was recently diagnosed as learning disabled and emotionally disturbed, his disability apparently had gone undiscovered for many years. Unapparent to the 4th Circuit, was the correlation between this lack of discovery and MCPS' refusal over more than a decade to respond to the repeated requests of Mrs. Sellers to have him tested.

The court goes on to state that IDEA provides a panoply of procedural rights to parents, yet it ignores the most fundamental right made available--the right to have your child tested. It is not a matter of negligence to affirmatively refuse to test a child when requested, it is a matter of bad faith or gross misjudgment, and systematic deprivation of guaranteed rights.

Much is made of the fact that the complaint states

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[4] 141 F.3d 524 (1998).

that MCPS own test results should have alerted them to the necessity for testing, but this is just objective support for the parent's repeated requests since first grade to have Kristopher tested. It is one thing to ignore test results year after year showing a child is in academic trouble; it is quite another to have this information, plus a parent's repeated requests to test, and to affirmatively take no action save to bring a truancy petition against the child.

As a society, we can ill afford to allow students to progress year to year without the academic skills necessary to advance to the next grade. Under the IDEA, MCPS had an affirmative legal duty not only to seek out Kristopher under the Child Find mandate[5], but once a request for testing had been made, to take action, and determine if special education services were required. MCPS took action only after Kristopher's parents obtained private evaluations and retained counsel to force MCPS to consider this information.

Once MCPS reviewed this information, they concurred with the findings that Kristopher was indeed both learning disabled and emotionally disturbed. Unfortunately, this revelation occurred ten years too late. Equipped with the private evaluations, MCPS offered an appropiate full-

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[5] 20 U.S.C. § 1412 Mandates that each state must have policies and procedures to ensure that all children with disabilities within that state are identified, located, and evaluated.

time special education placement. However, because it came more than a decade too late, Kristopher never availed himself of this opportunity.

By their decision, the Fourth Circuit, sends a message that school districts may ignore constitutionally and statutorily guaranteed rights. Indeed, their decision frustrates nearly thirty years of case law and statutes mandating school districts find, evaluate, and place students. The entire rationale for IDEA and its predecessors was to enable students to receive services without resorting to the courts.

MCPS ignored the Sellers for ten years. MCPS ignored their own standardized tests. MCPS ignored the IDEA. MCPS stonewalled the Sellers with the hope that they would concede. Left with no alternative, the Sellers retained counsel.

The Fourth Circuit decision placed the stamp of judicial approval on this type of conduct. The Fourth Circuit, in effect ruled that malfeasance, misfeasance, and nonfeasance can go unpunished with the simple promise to fix the immediate problem and not to do it again. Without the availability of damages the Child Find requirements of IDEA will continue to fall on deaf ears.

The Fourth Circuit is content to overlook the requests of Kristopher's parents in order to characterize this case as one of negligence because precedent provides no cause of action for "educational malpractice". While one

might concede malpractice in the refusal of MCPS to look at Kristopher's test scores year after year, the same cannot be said for MCPS refusal for over a decade to test Kristopher after repeated requests by his parents. Since all academic issues had been settled prior to Kristopher's appeal of the local and state level hearing officer's decisions, his complaint at the Federal level did not reveal in detail the factual bases for the procedural and substantive violations of IDEA and 504. This should not prevent Kristopher, at a trial on the issue of damages, from raising facts which would support his contentions that the long standing refusal of MCPS to evaluate him form the foundation for permitting him to prove that the award of damages against MCPS is justified.

The Fourth Circuit complains that since it took plaintiffs so long to bring the issues of lack of identification, testing and placement, stating that "[A]t this late date, it would be difficult to determine what particular school officials and special education instructors should have done to evaluate Kristopher or to provide him with particular services."[6] This rationale completely ignores the fact that it was MCPS' decade long refusal, after repeated requests by Kristopher's parents, to test and evaluate what services, if any, Kristopher needed. In effect the Fourth Circuit is

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[6] 141 F.3d 524 (1998).

rewarding school districts, like MCPS, who refuse to do what is fundamental under IDEA. If this conduct is rewarded it will be repeated with incalculable consequences to both society and students in need of special education.

The Fourth Circuit has precluded all remedies for IDEA violations except tuition reimbursement and restitution in providing the disabled child with an appropriate educational placement. The court relies on *Hall by Hall v. Vance County Bd. of Educ..*, 774 F.2d 629 (4th Cir. 1985).[7] *Vance* holds that, in cases of educational malpractice, not all forms of relief are available. According to the court, failure to evaluate a disabled student amounts to nothing more than educational malpractice. This holding conflicts with the Third Circuit holding in *Matula* .

In *Matula*, as in the case at hand, the court found that the school system acted affirmatively, not negligently, in persistently denying parental requests for assistance. This, the court held violated the student's rights under the IDEA and permitted an action for damages directly under the IDEA.

All public schools receiving federal monies under the IDEA are obligated to ensure that "All children with

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[7] The court refers to, but ignores, the holding in *Emma C. v. Eastin*, 985 F. Supp. 945 (N.D. Cal. 1997), holding that the IDEA provides an action for damages independent of, as well as in conjunction with, § 1983 claims. The court in *Emma C.* looks to legislative intent as well as precedent set in *Franklin v. Gwinnett.*

disabilities... are identified, located, and evaluated." 20 U.S.C.§ 1412. Although a mere failure to evaluate may be considered educational malpractice, an affirmative act on the part of the school system refusing to evaluate a student constitutes discrimination under the IDEA by depriving him of federally mandated services. *See, Jose P. v. Ambach*, 669 F.2d 865, 870-71 (2d Cir. 1982) (holding that failure to provide access to federally funded programs available to non-handicapped persons constitutes discrimination). This intentional discrimination violates that student's civil rights under the IDEA and the Constitution, making damages available to the injured student, *Matula*; *Walker v. District of Columbia Public Sch.*, 969 F. Supp. 794 (D.D.C. 1997).

In failing to distinguish educational malpractice with persistent, affirmative disregard of the federal law, the Fourth Circuit presents an opinion that conflicts with the intent of the statute to protect disabled students from discrimination due to their handicap and decisions of other courts.

II. THE DECISION OF THE FOURTH CIRCUIT THAT AFFIRMATIVE ACTION BY THE SCHOOL DISTRICT IN REFUSING REQUESTS FOR EVALUATION DOES NOT VIOLATE SECTION 504 OF THE REHABILITATION ACT WHEREBY DAMAGES ARE AVAILABLE CONFLICTS WITH DECISIONS OF OTHER COURTS

The Fourth Circuit holds that purposeful discrimination in the form of gross misjudgment or bad faith is required to show a violation of §504 . The court holds that the claim in this case is more of a negligence claim then a claim for gross misjudgment or bad faith.

While recognizing that more must be shown than a "mere failure to provide the free appropriate education required by the IDEA," the court neglects to address the instance where, as in this case, the school district does not only fail to evaluate, but acts affirmatively in refusing to evaluate a student with disabilities.

In a similar situation in *Matula*, where the school system acted affirmatively to refuse to evaluate and identify a disabled child the court found that the child's rights under § 504 were violated, thus monetary damages were available.

In *Matula*, the student was experiencing academic and behavioral problems at school. Despite repeated meetings with the parents and numerous parental requests for evaluation, the school system failed to evaluate the child, inform the parents of their rights under the IDEA, or provide him with necessary educational services. Only after the parents sought private evaluation did the school district recognize the child's disabilities and provide the appropriate special education services. The Third Circuit found that this intentional conduct by the school district in failing to evaluate a student with disabilities violated the student's rights under §504 , making damages available under that

statute, as well under the IDEA, and permitted an action under §1983 to enforce the IDEA .

In the case at hand, as in *Matula*, the school district did more than simply fail to provide the student a free and appropriate education. The school district persistently ignored parental requests for help and ignored standardized test results that mandated action on their part. This is not simply a case of inaction in failing to identify a handicapped child, but affirmative action lasting over a decade, in refusing to comply with statutorily defined criteria. This affirmative act constitutes both gross misjudgment and bad faith, violating § 504 and making monetary damages available to the petitioner independent of any other claim.

To label this decade long affirmative action as negligence rather than gross misjudgment and bad faith conflicts with the Third Circuit decision in *Matula* and cannot be reconciled with the holding in that case and the unambiguous Chiid Find mandate of Congress.[8]

III. THE FOURTH CIRCUIT'S DECISION TO PROHIBIT COMPENSATORY AND PUNITIVE DAMAGES UNDER 42 U.S.C. §1983 IN CONJUNCTION WITH THE IDEA CONFLICTS WITH CONSTITUTIONAL PROTECTION

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[8] *See*, FN 5.

AGAINST STATE ACTION, DECISIONS OF OTHER COURTS OF APPEAL, AND CONGRESSIONAL INTENT

In it's opinion in Sellers, the Fourth Circuit holds that because the statute did not unambiguously state that compensatory and punitive damages are available, petitioners are precluded from seeking such damages pursuant to the IDEA and §1983 . This clarity requirement is not determinative in this instance. Indeed, the Fourth Circuit opinion in *Commonwealth of Virginia Dept. of Educ.. v. Riley*, 106 F.3d 559 (4th Cir. 1997) did not require such an unambiguous statement when it found that nothing in the language of the IDEA requires that funding be conditioned on "continued provision of education to handicapped students expelled for criminal activity or other misconduct unrelated to their disabilities." *Id.* at 567. There, as here, Congress intended that states be given latitude in implementing the education of their respective citizens. Thus, where Congress is ambiguous regarding a key area of the statute, an analysis of the legislative history is required.

Further, the Fourth Circuit holds that because the IDEA contains it's own remedial scheme, parties are prohibited from pursuing an action under 42 U.S.C. §1983. In attempting to clarify any ambiguity concerning the availability of remedies aside from administrative remedies,

Congress amended the IDEA by adopting Section 1415 (f) into the 1986 Amendments to the IDEA[9], which provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, Title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children and youth with disabilities...

Id. The Fourth Circuit would hold this clause virtually meaningless by limiting the remedies available to only administrative remedies. The court maintains that this decision is not contrary to congressional intent despite acknowledging the following excerpts from the House Committee Report:

> In sum, since 1978, it has been Congress' intent to permit parents or guardians to pursue the rights of handicapped children through EHA section 504 and section 1983...

H.R. Rep. No. 99-296, at 4 (1985); and "It is the conferees' intent that actions brought under 42 U.S.C. § 1983 are governed by this provision," H.R. Conf. Rep. No. 99-687, at 7 (1986), reprinted in U.S.C.C.A.N. 1807, 1809.

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[9] This section is located at 1415(l) in the 1997 IDEA Amendments. Congress, in 1997 extensively ammended IDEA yet left this section intact.

Both statements refer to §1415 (f) of the 1986 Amendments to the IDEA.

To ignore this specifically stated intent, as the Fourth Circuit requires in this opinion, would preclude the constitutional right to be protected against abuses through state action guaranteed by the Fourteenth Amendment. Consistent with this argument, the Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980), held that §1983 was available to enforce violations of federal statutes by agents of the state. There are only two exceptions to the application of § 1983 to remedy statutory violations. The exceptions are where Congress has specifically foreclosed such enforcement of the statute and where the statute does not create enforceable rights, privileges or immunities within the meaning of §1983. *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981); *Middlesex County Sewage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981). Neither Congress nor the statute itself precludes a §1983 action to enforce the IDEA.

Where there is no preclusion of remedies, there is a presumption that all remedies are available. The Supreme Court reiterated that long standing theory of remedy in *Franklin v. Gwinnett*. More recently the Supreme Court in *Gebser v. Lago Vista Independent School District*, 96-1866, June 22, 1988, lent additional support to this presumption and further clarified *Franklin*. The Supreme Court in *Gebser* said that when a school official in a

position of authority has knowledge of a statutory violation, monetary damages are available to the student whose rights had been violated. In *Gebser*, the student was proceeding under Title IX violations wherein the school principal was unaware of the violative activities occurring. The court found that in that case, the school official in a position of authority must have actual notice of the violations. *Id.* at 17.

In the case at hand, the principal of the school was well aware of, and participated in, the school's violation of the IDEA. Thus, damages must be available to the Kristopher whose rights were denied by actions by the school, with the knowledge and participation of those in positions of authority.

Additionally, the Fourth Circuit relies heavily on the holding in *Smith v. Robinson*, 468 U.S. 992 (1984) in reaching their decision.[10] In so doing, the court disregards congressional intent and congressional response to the holding in that case. It was in response to *Smith* that Congress adopted §1415(f) to the IDEA in the 1986 Amendments, later adopted in the 1997 Amendments at §1415(l). Indeed, the Congressional Record, Vol. 131, 21387, 21389 (July 30, 1985) contains the statement:

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[10] The court in *Smith v. Robinson* held that the EHA (predecessor to the IDEA) contained comprehensive remedies that precluded the use of other statutory remedies.

> Unfortunately, because the court in *Smith v. Robinson* misinterpreted Congress' intent, handicapped children are now provided substantially less protection against discrimination than other vulnerable groups of people. Section 1415 would remove these inequities by restoring equivalent protection to handicapped children, a group undeniably deserving congressional protection.

Thus the opinion in *Smith* was categorically preempted by the adoption of §1415. The decision of the Fourth Circuit to ignore this specifically stated intent has created a conflict between the decision in this case and those in other circuits. Indeed, the Third Circuit in *Matula*, relied on congressional intent and the wording of the statute in permitting an action on damages to be brought under 42 U.S.C. §1983 in order to enforce the IDEA and §504. In *Matula*, despite a history of repeated meetings with the parents concerning their child's disability and numerous parental requests for evaluation, the school system failed to evaluate the child or provide him with necessary educational services. Only after the parents sought private evaluation did the school district recognize the child's disabilities and provide the appropriate special education services.

The court recognized that relief under the IDEA was not limited in any way and concluded that the presumption

in favor of all appropriate relief did not preclude using a §1983 claim to enforce the IDEA. 67 F.3d at 495. [11] Further, because the relief sought was not available under IDEA administrative proceedings, the parent was permitted to proceed with court action before exhausting administrative remedies.

The present case is remarkably similar to *Matula*. In the case at hand, the parents also repeatedly requested an educational evaluation. They were also refused by the school district and sought outside evaluations. Only after these outside evaluations showed that Kristopher was handicapped did he receive the educational services that had been denied him since the first grade. In both cases, the rights of the child were respected only after counsel was hired.

In the case at hand, the Fourth Circuit does not recognize a right to enforce the IDEA and receive damages under 42 U.S.C. §1983. This decision cannot be harmonized with the Third Circuit decision in *Matula*.[12]

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[11] The Fifth Circuit reached a similar decision. *See Angela L. v. Pasadena Independent Sch. Dist.*, 918 F.2d 1188, 1193 n.3 (5th Cir. 1990)(holding §1983 and §504 "permit parents to obtain relief which otherwise is unavailable from the EHA").

[12] The District Court of the District of Columbia also permitted a student to bring an action for monetary damages under §1983 for violations of the IDEA. In *Walker v. District of Columbia*, 969 F. Supp. 794 (D.D.C. 1997), the court examined the language and legislative intent of the IDEA and

III. CONCLUSION

In light of the conflicting opinions between the Courts of Appeals and the conflict in interpretation of the legislative history involving the issue of availability of damages in enforcing the IDEA and Section 504 of the Rehabilitation Act through 42 U.S.C. § 1983, this issue is ripe for review by this Court.

Respectfully submitted,

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concluded that it did not limit the remedies available to parents whose children's rights have been violated. In *Walker*, the student was not evaluated despite repeated parental requests. When finally evaluated, the student was incorrectly classified and did not receive an appropriate education until counsel was retained. The court held that "alternative civil rights remedies, such as IDEA claims brought through Section 1983 are available to IDEA plaintiffs."

PETITIONERS' APPENDIX

Appendix
Table of Contents

1. *Sellers v. School Board of City of Manassas, Va.*, 141 F.3d 524 (4th Cir. 1998). A2

2. *Sellers v. School Board of City of Manassas, Va.*, 960 F. Supp. 1006 (E.D. Va. 1997). A23

3. Memorandum Decision from State Review Board, *Sellers v. School Board of City of Manassas* A43

4. Memorandum Decision, Local Hearing Officer, *Sellers v. School Board of City of Manassas* A46

5. Order Dismissing Truancy Petition Juvenile and Domestics Relations District Court of Prince William County A51

6. Constitutional Provisions A52

7. Statutory Provisions A52

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

KRISTOPHER SELLERS, by his parents, Allen and Sherri Sellers; SHERRI SELLERS; ALLEN SELLERS,
Plaintiffs-Appellants.

v.

THE SCHOOL BOARD OF THE CITY OF MANASSAS, VIRGINIA, a Municipal Corporation; JAMES E. UPPERMAN Superintendent of the School Board of the City of Manassas,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
T. S. Ellis, III, District Judge.
(CA-96-1630)

Argued: January 29, 1998

Decided: April 13, 1998

Before WILKINSON, Chief Judge, PHILLIPS, Senior Circuit Judge, and VOORHEED, United States District Judge for the Western District of North Carolina, sitting by designation.

Affirmed by published opinion. Chief Judge Wilkinson wrote

the opinion, in which Senior Judge Phillips and Judge Voorhees joined.

COUNSEL

ARGUED: Paul S. Dalton, DALTON & DALTON, P.C., Annandale, Virginia, for Appellants. Kathleen Shepherd Mehfoud, HAZEL & THOMAS, P.C., Richmond, Virginia, for Appellees.

OPINION

WILKINSON, Chief Judge:

Kristopher Sellers and his parents sued the School Board of the City of Manassas and superintendent James Upperman, alleging violations of the Individuals with Disabilities Education Act ("IDEA"), section 504 of the Rehabilitation Act, 42 U.S.C. § 1983, and Virginia law. The Sellers sought compensatory and punitive damages. The district court granted the defendants' motion to dismiss primarily on the grounds that such damages are unavailable under IDEA, that the Sellers failed to allege a section 504 violation, and that the Sellers' failure to state a claim under either IDEA or section 504 likewise required dismissal of the section 1983 claim. Sellers v. School Bd. of Manassas, 960 F. Supp. 1006 (E.D. Va. 1997). We agree that IDEA does not provide for compensatory or punitive damages and that plaintiffs failed to allege a section 504 violation. Furthermore, because parties may not sue under section 1983 for IDEA violations, the Sellers' claim under that statute also must be dismissed.

Accordingly, we affirm the judgment of the district court.

I.

The instant appeal is from a dismissal for failure to state a claim, see Fed. R. Civ. P. 12(b)(6); thus we accept the facts alleged in the complaint as true. McNair v. Lend Lease Trucks, Inc., 95 F.3d 325, 327 (4th Cir. 1996) (en banc). At the time the Sellers filed their complaint, Kristopher was eighteen years old. Although he had recently been diagnosed as learning disabled and emotionally disturbed his disability apparently had gone undiscovered for many years. Kristopher received no special education services until the 1995-1996 school year. The complaint states, however, that his test scores as early as fourth grade "should have alerted" the defendants of the need to test and evaluate Kristopher for disabilities. At some point, a truancy petition was brought against Kristopher but was dismissed in March 1996 by the domestic relations court because administrative proceedings under IDEA were pending.

According to the complaint, the parties to the present suit reached a settlement as to all educational issues. After the settlement, a hearing officer held due process hearings and decided that he lacked authority to award compensatory and punitive damages. The Sellers sought review of the decision by a state-level hearing officer. He too, however, concluded that hearing officers lacked authority to award such damages. The Sellers then filed the present suit in the United States District Court for the Eastern District of Virginia, seeking, inter alia, compensatory and punitive damages for violations of IDEA, the Rehabilitation Act, 42 U.S.C. § 1983, and

Virginia law. They complained that the defendants should have discovered Kristopher's learning disabilities and provided him with special education services. The Sellers also disputed the hearing officers' refusal to award compensatory and punitive damages. Terming the Sellers' action one for educational malpractice, the district court dismissed the Sellers' lawsuit pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The Sellers now appeal the dismissal of their IDEA, Rehabilitation Act, and section 1983 claims.[13]

II.

We first address the Sellers' claim under IDEA. The Sellers appear to base their claims on two alleged violations of the statute. First, because the defendants did not evaluate Kristopher for learning disabilities after certain test scores should have alerted them of the need to do so, they neglected their duty to identify, locate, and evaluate disabled children. Second, because Kristopher did not receive any special education services prior to the 1995-1996 school year, defendants did not provide him with a free appropriate public education.

For these alleged violations, the Sellers contend that they are entitled to compensatory and punitive damages under IDEA. See Emma C. v. Eastin, 985 F. Supp. 940, 945 (N.D.Cal. 1997).

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[13] The Sellers also presented due process and equal protection claims in their complaint. The district court dismissed these claims in its memorandum opinion. In their brief on appeal, the Sellers do not contest the district court's dismissal of the constitutional claims.

IDEA provides that a court reviewing the findings and determination of a hearing officer "shall grant such relief as [it] determines is appropriate. "20 U.S.C. § 1415(e)(2).[14] In Hall by Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985) ("Vance"), this court interpreted the meaning of "appropriate" relief in an earlier version of IDEA. Vance held that appropriate relief could include reimbursement for private school tuition where a county board of education had failed to provide a free appropriate public education to a disabled child. Id. at 633. It followed an earlier decision of the Supreme Court that had likewise found appropriate relief could include tuition reimbursement. School Comm. of Burlington v. Department of Educ. of Mass., 471 U.S. 359, 370 (1985). However, Vance made clear that not all forms of relief are appropriate. While the Act permitted reimbursement, it did "not create a private cause of action for damages for educational malpractice." Vance, 774 F.2d at 633 n.3.

Vance bars the Sellers' recovery under IDEA. Their claim is indistinguishable from one of educational malpractice. The

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[14] Congress recently amended IDEA. See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997). All of the conduct in this case occurred prior to the enactment of these amendments. We note that several other courts have declined to apply the amendments to conduct occurring before their enactment. E.g., Heather S. by Kathy S. v. Wisconsin, 125 F.3d 1045, 1047 n.1 (7th Cir. 1997); Cypress Fairbanks Inde. Sch. Dist. v. Michael F., 118 F.3d 245, 247 n.1 (5th Cir. 1997), cert. denied, 118 S. Ct. 690 (1998). While the amendments recodified several provisions of the IDEA to which we refer, we cite those provisions as codified prior to the enactment of the amendments. In all events. the amendments would make no difference to the outcome of this case.

Sellers simply allege that the defendants improperly diagnosed Kristopher and that as a result, either they or Kristopher have suffered some unspecified tort-like injuries. To award compensatory or punitive damages under these circumstances would disregard settled circuit precedent.

Nothing in the years since Vance has undermined the soundness of its holding. Tort-like damages are simply inconsistent with IDEA's statutory scheme. The touchstone of a traditional tort-like remedy is redress for a broad range of harms "associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages." United States v. Burke, 504 U.S. 229, 239 (1992) (interpreting Title VII). By contrast, the touchstone of IDEA is the actual provision of a free appropriate public education.

To advance this goal, IDEA provides a panoply of procedural rights to parents to ensure their involvement in decisions about their disabled child's education. See Burlington, 471 U.S. at 368: see also Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982). For example, parents may examine all relevant records relating to their disabled child's identification, evaluation, placement, and receipt of a free appropriate public education. 20 U.S.C. § 1415(b)(1)(A). They must receive written notice prior to changes in the child's identification, evaluation, placement, or receipt of a free appropriate public education. Id.§ 1415(b)(1)(C). They also may present complaints with respect to such matters. Id. § 1415(b)(1)(E). They can air these complaints in an "impartial due process hearing," id. § 1415(b)(2), and, in some cases, can appeal the findings and

decision rendered in that hearing. Id. § 1415(c). Finally, a party aggrieved by the findings or decision of a hearing officer may seek judicial review. Id. § 1415(e)(2).

The purpose of these procedural mechanisms is to preserve the right to a free appropriate public education, not to provide a forum for tort-like claims of educational malpractice. Accordingly the Supreme Court has noted that "equitable considerations are relevant in fashioning relief." Burlington 471 U.S. at 374; see also Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 16 (1993). For example, the Court in Burlington concluded that "by empowering the court to grant `appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case." 471 U.S. at 370; see also Florence County, 510 U.S. at 14. Tuition reimbursement requires an education agency "to belated pay expenses that it should have paid all along." Burlington, 471 U.S. at 370-71. Likewise, appropriate relief may include special education services. Such services are part and parcel of the free appropriate public education to which the child is entitled. See id. at 367-68. But the Court has never approved an award of compensatory or punitive damages under IDEA for a violation of its requirements. In fact, it "took pains to emphasize that. . .reimbursement [for appropriate specialized education] should not be characterized as `damages.'" Hall v. Knott County Bd. of Educ., 941 F.2d 402, 407 (6th Cir. 1991) (citing Burlington, 471 U.S.at 370; see also Whitehead by and through Whitehead v. School Bd. for Hillsborough County, 918 F. Supp. 1515, 1519 (M.D. Fla. 1996). Compensatory or punitive damages would transform IDEA into a remedy for pain and suffering, emotional distress, and other consequential damages caused by the lack of a free

appropriate public education. Such a result would be inconsistent with the structure of the statute, which so strongly favors the provision of and, where appropriate, the restoration of educational rights.[15] Charlie F. v. Board of Educ. of Skokie Sch. Dist., 98 F.3d 989, 991 (7th Cir. 1996); Hall v. Knott County, 941 F.2d at 407; Manecke v. School Bd. of Pinellas County, 762 F.2d 912, 915 n.2 (11th Cir. 1985).

The Sellers base their claims on events that occurred as far back as the fourth grade. Yet they did not file their complaint until Kristopher was eighteen years old. To entertain the Sellers' claim thus seems inconsistent with a scheme structured to encourage prompt resolution of special education disputes. E.g., Schimmell by Schimmel v. Spillane, 819 F.2d 477, 483 (4th Cir. 1987) applying Virginia's one-year statute of limitations to civil actions brought under IDEA); 8 Va. A.D.C. § 20-80-70.A.10.I (requiring appeals from local hearing officer's decision to be instituted within thirty administrative working days). At this late date, it would be difficult to determine what particular school officials and special education instructors should have done to evaluate Kristopher or to provide him with particular services.

Not only are awards of compensatory and punitive damages inconsistent with IDEA's structure, they present acute problems of measurability. Relief such as retroactive reimbursement is definable and concrete. The actual costs

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[15] This carefully crafted statutory scheme, primarily concerned with the provision of special education and related services, overcomes a "presumption in favor of any appropriate relief for violation of a federal right." Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 73 (1992).

borne by parents for special education and related services provide an ascertainable benchmark for calculating the relief to which they may be entitled. By contrast, IDEA lacks any particular standard by which a court could evaluate what amount of compensatory and punitive damages is appropriate in a particular case. Compare 42 U.S.C. § 1981a(b)(3) (providing a schedule for awards of compensatory and punitive damages for certain violations of Title VII). Absent any such standards, the range of possible monetary awards would be vast, particularly in cases seeking recovery for less tangible injuries such as emotional distress or pain and suffering. Such a result is not consistent with a statute designed primarily to provide education to disabled children.

Finally, we note that other circuits share our view that compensatory and punitive damages are generally unavailable under the statute. E.g., Charlie F., 98 F.3d at 991 (compensatory damages unavailable); Heidemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996) (general or punitive damages unavailable); Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382, 386-87 (6th Cir. 1992) (compensatory or punitive damages unavailable); Knott County, 941 F.2d at 407 (general damages unavailable); Manecke, 726 F.2d at 916 n.2 ("tort-type damages" unavailable); Whitehead, 918 F. Supp. at 1520 (compensatory or punitive damages unavailable). Like this circuit, they reason that the structure of IDEA and the Supreme Court's decisions interpreting it do not support these forms of relief. Accordingly, the district court properly dismissed the Seller's claims.

III.

The Sellers next argue that, even if they cannot recover compensatory and punitive damages under IDEA, such damages are recoverable for a violation of section 504 of the Rehabilitation Act, 29 U.S.C. §794(a). They maintain that the defendants' failure both to identify Kristopher's disability and to provide him with a free appropriate public education violated section 504 because it constituted discrimination against Kristopher solely on the basis of his disability. Because the Sellers merely reallege a violation of IDEA, and fail to allege facts sufficient to state a claim under section 504, we reject their argument.

IDEA and the Rehabilitation Act are different statutes. Whereas IDEA affirmatively requires participating States to assure disabled children a free appropriate education, see, e.g., 20 U.S.C. §1421(1), section 504 of the Rehabilitation Act instead prohibits discrimination against disabled individuals. Section 504 states: "No otherwise qualified individual with a disability in the United States..shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..."29 U.S.C. §794(a).

We have held that to establish a violation of section 504, plaintiffs must prove that they have been discriminated against--that they were "excluded from the employment or benefit due to discrimination solely on the basis of the disability." Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261,1265 (4th Cir. 1995) (emphasis added). This

discrimination requirement is rooted in two parts of the statute's text: plaintiffs must prove that they have either been "subjected to discrimination" or excluded from a program or denied benefits "solely by reason of" their disability. To prove discrimination in the education context, "something more than a mere failure to provide the "free appropriate education" required by [IDEA] must be shown." Monohan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982); see also Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577, 1580 (D.C. Cir. 1984). We agree with those courts that hold "that either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of handicapped children." Mohahan, 687 F.2d at 1171; see also Hoekstra v. Independent Sch. Dist. No. 283, 103 F.3d 624, 626-27 (8th Cir. 1996) cert. denied, 117 S. Ct. 1852 (1997); Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152 (N.D.N.Y. 1997).

In their complaint, the Sellers contend only that Kristopher's test scores from as early as fourth grade "should have alerted" the defendants of his disability and the need to provide him with a free appropriate public education. The complaint therefore presents, at best, a negligence claim--that the defendants should have recognized Kristopher's disability. The court in Monahan specifically addressed situations in which plaintiffs allege a section 504 violation in the education context on the basis of negligence:

> The reference in the Rehabilitation Act to "discrimination" must require, we think, something more that an incorrect evaluation, or a substantively

> faulty individualized education plan, in order for liability to exist. Experts often disagree on what the special needs of a handicapped child are, and the educational placement of such children is often necessarily an arguable matter. That a court may, after hearing evidence and argument, come to the conclusion that an incorrect evaluation has been made, and that a different placement must be required under [IDEA], is not necessarily the same thing as a holding that a handicapped child has been discriminated against solely by reason of his or her handicap.

687 F.2d at 1170. The Sellers' claim that the defendants failed to notice signs of disability is virtually indistinguishable form complaints that a student has been incorrectly evaluated. They allege no facts which would suggest the defendants discriminated, i.e., that they acted with bad faith or gross misjudgment. In similar cases involving allegations of a school district's failure to "timely assess and diagnose" a child's disability, courts have been reluctant to find in misdiagnoses the evidence of bad faith or gross misjudgment sufficient to support a discrimination claim under section 504. Wenger, 979 F. Supp. at 153; Brantley v. Independent Sch. Dist. No. 625, 936 F. Supp. 649, 657 (D. Minn. 1996). The Sellers likewise raise nothing more than a failure to timely assess and diagnose Kristopher's disability. Their complaint does not clear the hurdle set by the explicit language of section 504. We hold, therefore, that the district court correctly dismissed the Sellers' claim under the Rehabilitation Act.

IV.

The Sellers next contend that they still may recover compensatory and punitive damages under 42 U.S.C. § 1983. They argue that the other courts have recognized both that the section 1983 actions may be premised on IDEA violations, and that plaintiffs may recover monetary damages pursuant to such action. See, e.g., W.B. v. Matula, 67 F.3d 484,493-95 (3d Cir. 1995). We disagree. Because IDEA provides a comprehensive remedial scheme for violations of its own requirement, we hold that parties may not sue under section 1983 for an IDEA violation.

A.

In Smith v. Robinson, 468 U.S. 992 (1984), the Supreme Court considered whether plaintiffs could pursue, under section 1983, claims based on the Rehabilitation Act or Equal Protection Clause when such claims were "virtually identical to" those made under the Education of the Handicapped Act ("EHA") (IDEA's predecessor). The Court found that EHA's comprehensive remedies demonstrated Congress' intent that disabled children pursue claims to a free appropriate public education solely through the remedial mechanisms established by the statute. Id. at 1009. Specifically, the Court held:

> We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.

Id. at 1013 (emphasis added). Under Smith, therefore, the Sellers undoubtedly would be precluded form circumventing IDEA's limits on remedial relief by suing instead under section 1983 for the alleged IDEA violations.

The Sellers argue, however, that the 1986 amendments to EHA, enacted in response to the Smith decision, demonstrate a clear congressional intent the plaintiffs once again be permitted to sue under section 1983 for IDEA violations. We disagree. A closer reading of the 1986 provision relied upon by the Sellers--20 U.S.C. § 1415(f)--reveals no intent that parties be able to bypass the remedies provided in IDEA by suing instead under section 1983 for an IDEA violation.

Section 1415(f) provides: "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with disabilities..." Id. (emphasis added). [16] Concededly amended section 1415 (f)

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[16] We note that even were we applying IDEA after its amendment in 1997, our analysis would remain the same. Congress amended section 1415 (f) only with respect to matters unrelated to the issue we consider in this decision. For example, Congress added language to indicate that IDEA also does not preclude the pursuit of remedies under the Americans with Disabilities Act of 1990: "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities..."20 U.S.C. § 1415 (l) (language added by amendment in italics).

overrules much of Smith's holding. The amendment specifically rejects the Smith Court's interpretation of EHA as precluding claims under the Constitution or the Rehabilitation Act that are virtually identical to EHA claims. But while section 1415 (f) explicitly preserves remedies under the Constitution, the Rehabilitation Act, and specified "other" statutes, it simply fails to mention section 1983. The reference to "other" statutes protecting the rights of disabled children cannot naturally be read to include 42 U.S.C. § 1983, a statute which speaks generally and mentions neither disability nor youth. By preserving rights and remedies "under the Constitution." section 1415 (f) does permit plaintiffs to resort to section 1983 for constitutional violations, notwithstanding the similarity of such claims to those stated directly under IDEA to provide the sole remedies for violations of the same statute. If Congress meant to overrule Smith on this significant point, it certainly chose an oblique and essentially implausible means of doing so.

The different standards of liability applicable to constitutional equal protection claims and to statutory IDEA claims confirm our interpretation of section 1415(f). Under IDEA, the simple failure to provide a child with a free appropriate public education constitutes a violation of the statute. 20 U.S.C. §1412 (1). By contrast, plaintiffs must meet a higher standard of liability to prevail on a constitutional claim. The Supreme Court's decision in Washington v. Davis, 426 U.S. 229, 239 (1976), require that an equal protection claim be supported by evidence of purposeful discrimination. In the context of

education of disabled children, Washington's purpose requirement is similar to that recognized under section 504 of the Rehabilitation ct. And even if a plaintiff can prove a school board intended to treat children differently because of their disabilities, another hurdle would remain. Because the Supreme Court has yet to classify disabled persons as a suspect class, see City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445-46 (1985), and because the Court also has not identified education as fundamental right, San Antonia Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-37 (1973), a plaintiff in this context would have to prove that a school board's decision was without any rational basis. Naturally school boards will be subject to liability for statutory IDEA violations much more frequently than for similarity pled constitutional claims. It is easy therefore to understand Congress intended to subject school boards to the more expansive remedies available under section 1983 for their more culpable constitutional failures, yet not for breaches of IDEA. Section 1415 (f) sensibly retains IDEA's comprehensive scheme as the remedy for violations of that Act.

The Sellers nevertheless attempt to supplement, and thereby evade, the limited textual command of section 1415(f) by relying on the legislative history of the 1986 amendments. Even if the text were not the sole authoritative source of the section 1415(f)'s meaning, the legislative history would still fail to support the proposition that Congress intended that plaintiffs be able to sue under section 1983 for IDEA violations. The Sellers first rely on the following excerpt from the House Committee Report:

> In sum, since 1978, it has been Congress' intent to permit parents or guardians to pursue the rights of handicapped children through EHA, section 504, and section 1983... Congressional intent was ignored by the U.S. Supreme Court when, on July 5, 1984, it handed down its decision in Smith v. Robinson.

H.R. Rep. No. 99-296, at 4 (1985). The Sellers also support their argument with a brief excerpt from the House Conference Report, which states: "It is the conferee's intent that actions brought under 42 U.S.C. 1983 are governed by this provision." H.R.Conf. Rep. No. 99-687, at 7 (1986), reprinted in 1986 U.S.C.C.A.N. 1807, 1809.

Nothing in these portions of the legislative history contradicts our construction, grounded in the text of the section 1415(f). The House Reports indicate a legislative intent that disabled children be able to protect their rights through IDEA, the Rehabilitation Act, other statutes protecting the rights of disabled children, and the Constitution itself. The Reports naturally refer to section 1983, as it supplies disabled children and their parents or guardians with a private right of action for constitutional violations. Again, however, even when read in the light most favorable to the Sellers' claims, these portions of the House Reports fail to indicate any legislative intent with respect to section 1983 claims premised on IDEA violations. When construed in their most natural form, the excerpts demonstrate the unremarkable proposition that Congress intended section 1415(f) to restore the ability of disabled children and their parents or guardians to utilize section 1983 to protect constitutional rights.

B.

Our interpretation of section 1415(f) is also shaped by rules of construction reserved for federal statutes placing funding conditions on the States. IDEA is a joint federal-state program enacted under Congress' spending power. See Virginia Dep't of Educ. v. Riley, 106 F. 3d 559, 566-68(4th Cir. 1997) (en banc). In return for federal funds to aid the education of disabled children, participating States must meet certain statutory requirements. See U.S.C. § 1412 ("In order to qualify for assistance..., a State shall demonstrate to the Secretary that the following conditions are met..."). In Pennhurst State School & Hospital v. Halderman, U.S. 1, 17 (1981), the Supreme Court announced an interpretive rule for statutes like IDEA enacted pursuant to the spending power. Because these statutes operate much like contracts between the federal and state governments, "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract." Suter v. Artist M., 503 U.S. 347, 356 (1992) (quoting Pennhurst, 451 U.S. at 17) (internal quotation marks omitted). States cannot knowingly accept federal funding conditions unless they are accurately apprised of the federal requirements being imposed by the federal government. Thus, "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously...'" South Dakota v. Dole, 483 U.S. 203,207 (1987) (quoting Pennhurst, 451 U.S. at 17); see also Blessing v. Freestone, 117 S.Ct. 1353, 1359 (1997); Suter, 503 U.S. at 356.

The Court held in Smith that EHA's comprehensive remedial

scheme demonstrated Congress' intent that both EHA and equal protection claims to a free appropriate public education proceed solely through EHA's remedial mechanisms. 468 U.S. at 1013. States deciding whether to subject themselves to the statute's funding conditions therefore understood, after Smith, that their school boards and officials would not be subject to liability under section 1983 for EHA violations. Because IDEA is enacted pursuant to the spending power, Congress' statutory response to the Smith decision must be subjected to Pennhurst's clear statement rule. If Congress intended section 1415 (f) to permit plaintiffs to sue under section 1983 IDEA violations, and thereby overrule Smith in that respect, it had to speak with clarity.

Section 1415(f) lacks clarity. The provision fails to state, of even imply, that section 1983 suits may be brought for IDEA violations. Instead, it pointedly omits 42 U.S.C. §1983 form its list of statutes. This omission is significant. Permitting the recovery of general damages through section 1983 for IDEA violations would subject school boards to damages exponentially greater than the tuition reimbursement they currently face under IDEA itself. Section 1415 (f)'s vague language surely did not place State on notice of such sweeping and open-ended liability. If we were to permit section 1983 claims like the Sellers' to proceed, we would effectively blind side States with large and unanticipated penalties. Accordingly, we hold that section 1415 (f) fails to express unambiguously a congressional intent that IDEA violations

also be remedied by section 1983.[17]

In light of the Court's holding in Smith, section 1415 (f)'s effect on that decision, and the spending power concerns implicit in this question of interpretation, we hold that the Sellers cannot sue under section 1983 for alleged IDEA violations.[18] As a result, we reject their attempt to recover compensatory and punitive damages unavailable in an action directly under IDEA. We note that our conclusion is consistent with at least two other circuits that have held

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[17] The Sellers argue that Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987), should alter our conclusion. The Court did find that the Housing Act conferred benefits that were delineated specifically enough "to qualify as enforceable rights under Pennhurst." Id. at 432. This finding, however, did not signify that Pennhurst's rule of statutory construction was in any way relaxed. Moreover, on the question of whether the Housing Act's remedial scheme foreclosed reliance on section 1983, the Wright Court explicitly cited Smith for its holding that EHA's provision of a private judicial remedy did evidence a congressional intent to preclude reliance on section 1983. 479 U.S. at 427. Wright, in other words, actually confirmed the very point at issue in this case.

[18] Because the Sellers do not contend that the defendants failed to abide by an administrative order, their case is not controlled by our decision in Robinson v. Pinderhughes, 810 F.2d 1270 (4th Cir. 1987). In Pinderhughes, we found an exception to the Court's holding in Smith solely with respect to EHA' enforcement mechanism because it was not sufficiently comprehensive to preclude reliance on section 1983. Id. at 1274. The Sellers' complaint, however, is based on the more general denial of a free appropriate public education and therefore squarely controlled by Smith.

compensatory and punitive damages are not available through the alternate route of a section 1983 claim for violations of IDEA. See Heidemann, 84 F.3d at 1033 (general damages unavailable in section 1983 claim for alleged IDEA violations); Crocker, 980 F. 2d at 386-87 (same).

V.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

Kristopher SELLERS, by his parents Alan Sellers and Sherri Sellers and Sherri Sellers, Plaintiffs,

v.

SCHOOL BOARD OF THE CITY OF MANASSAS, VIRGINIA, et al., Defendants.

C.A.No. 96-1630-A.

United States District Court,
E.D. Virginia.

April 30, 1997

Paul S. Dalton, Dalton & Dalton, P.C., Annandale, for Plaintiffs. Kathleen S. Mehfoud, Hazel & Thomas, P.C., Richmond, for Defendants.

MEMORANDUM OPINION

ELLIS, District Judge.

This is essentially an action for educational malpractice.

An 18-year-old plaintiff whose learning disabilities (LD) were only recently discovered, claims that defendants

reasonable should have identified his condition in the fourth grade, not high school. As a result, plaintiff claims that for years defendants have denied him equal access to a "free appropriate public education" in violation of the Individuals with Disabilities Education Act (the 'IDEA"), § 1985 ("§ 1985"), and the Fourteenth Amendment. For this, plaintiff claims that he is due compensatory and punitive damages.

For the reasons that follow, this claim is meritless and plaintiffs complaint must be dismissed as failing to state a claim upon which relief can be granted.[1]

Plaintiff, Kristopher Sellers, is an 18-year-old high school student enrolled in the Manassas City Public Schools, since at least the fourth grade. Recently, school officials discovered that he is LD and has a emotional disorder.[2] Following this discovery, Kristopher's parents initiated a so-called "due process" proceeding under the IDEA to contest

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[1] For the purpose of resolving defendants Rule 12(b)(6) motion to dismiss the complaint, the facts alleged must be accepted as true. *See Estate Const. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.3d 213, 217-18 (4th Cir.1994); *Martin Marrietta Corp. v. International Telecommunications Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1992).

[2] The complaint does not disclose precisely when this discovery occurred, nor does it reveal the nature of Kristopher's LD and emotional disorder. Neither of these details is necessary to the resolution of the motion at bar.

the school district's management of Kristopher' education.[3] As a result of this proceeding, Kristopher and his parents resolved with school officials all educational issues pertaining to Kristophers's disabilities.[4]

Yet, this did not end the matter; Kristopher and his parents sought more. In particular, they requested that the due process hearing officer award them compensatory and punitive damages for the denial of special education and related services since the fourth grade, owing to defendants' negligent failure to detect Kristopher's LD. The hearing officer considered and rejected this request, concluding that he had no statutory authority to award compensatory or punitive damages in the circumstances. The parents promptly appealed this ruling to the state educational agency. On October 10,

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[3] When parents and school officials disagree about a student's eligibility, evaluation, programming, or placement, the IDEA entitles parents to an impartial due process hearing. 20 U.S.C. § 1415(b)(2). A hearing officer presides over this proceeding and in the course of it, allows limited discovery, attempts to facilitate a settlement and ultimately, if necessary, issues a written decision resolving the disputed issues. 20 U.S.C. 1415(c). *See Lewis v. School Bd. of Loudoun County,* 808 F.Supp. 523, 525-26 (E.D.Va.1992)

[4] Presumably, this means that the parties managed to design a mutually-agreeable "individualized education program" ("IEP") for Kristopher pursuant to the IDEA. An IEP outlines the student's special educational needs and the instruction and related services necessary to meet those needs. 20 U.S.C. § 1401(19). School officials must review and, if necessary, revise each qualified student's IEP at least annually. 20 U.S.C. § 1414(a)(5).

1996, the state agency affirmed the adverse decision.

Thereafter, Kristopher filed this four count complaint, seeking compensatory and punitive damages on multiple theories,[5] against the School Board of the City of Manassas, School Superintendent James Upperman, and the Manassas City Public Schools for failing to identify his disabilities since at least the fourth grade. Specifically, Count I alleges that defendants' failure to provide Kristopher with a "free appropriate public education" violates the IDEA, § 504, and Virginia law. Count II claims that defendant's failure to test Kristopher for LD and to place him in special education violates the IDEA, § 504, and Virginia Law. Count III asserts that the hearing officer served in determining that they had no statutory authority to award compensatory and punitive damages. And Count IV alleges that defendants' failure to provide a free appropriate public education constituted a governmental "custom or usage" with the force of law.

On December 10, 1996, defendants filed the instant motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), Fed.R.Cia.P. Thereafter, on February 3, 1997, the Court heard oral argument, took defendants' motion under advisement, and ordered the parties to submit supplemental briefs. The parties have done so, and hence the matter is now ripe for disposition.

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[5] Specifically, in the first sentence of his five page complaint, Kristopher bases his claim for compensatory and punitive damages on the following statutory and constitutional grounds: the IDES, § 504; § 1983, § 1985, and the Fourteenth Amendment of the U.S. Constitution.

II

Plaintiff cites the U.S. Constitution,, four federal statutes, and state common law in support of his compensatory and punitive damages claim. Each of these legal grounds is separately addressed.

A

The centerpiece of special education law is the IDEA, which plaintiff understandably places chief reliance. Thus, analysis properly focuses first on this statute.

In 1975, Congress enacted the Education for All Handicapped Children Act, Pub.L. No. 94-142, 89 Stat, 773 (1975), now known as the IDEA.[6] The act's purpose is "to assur[e] that all [] children (with disabilities) have available to them...a free appropriate public education which emphasizes special education and related services designed to meet their unique needs."[7] "To accomplish this ambitious objective, the [IDEA] provides federal money to state and local educational agencies that undertake to implement the substantive and

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[6] In 1990, the Education for All Handicapped Children Act ("EAHCA") was renamed the IDEA. Education Of the Handicapped Act, Amendments of 1990, Pub.L. No. 101-476, 901(a), 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. § 1400(a)). Throughout the former EAHCA, the words "handicaps" and "handicapped" children disabilities." at § 901(b) (codified as amended at 20 U.S.C. § 1400).

[7] 20 U.S.C. § 1400(c).

procedural requirements of the Act."[8] Among the IDEA'S numerous requirements that a state must satisfy in order to receive federal funding are that it identify students with disabilities[9] and that is develop an individualized education program ("IEP") for each identified student.[10] The IDEA also imposes extensive procedural requirements that guarantee parents access to the pertinent records of their children, [11] written notice of proposed changes to the IEP,[12] and the right to contest decisions at a impartial due process hearing. [13]

Section 615(e) (2), 20 U.S.C. § 1415(e)(2), authorizes parents "aggrieved by the findings an decisions" of a state administrative proceeding to bring a civil action in state or federal court and confers upon the courts reviewing those complaints the authority to "grant such relief as the court determines is appropriate." [14] This is the specific IDEA

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[8] *Burlington School Committee v. Department of Educ. of the Commonwealth of Mass.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985): *see also Hendrick Hudson Dist., Bd. of Educ. v. Rowley*, 458 U.S. 176, 181, 102 S.Ct. 3034,3038, 73 L.Ed.2d 690 (1982); 20 U.S.C. § 1412(1).

[9] 20 U.S.C. § 1412(C).

[10] 20 U.S.C. § 1401(18).

[11] 20 U.S.C. § 1415(b)(1)(A).

[12] 20 U.S.C. 1415(b)(1)(c)

[13] 20 U.S.C. § 1415(b)(1)(E).

[14] The provision provides that:

provision on which plaintiff relies in support of his compensatory and punitive damages claim. Yet, this reliance is misplaced, for it is well-settled that such damages are not available under § 615(e)(2), which "permits a reimbursement remedy, but ... does not create a private cause of action for damages for educational malpractice." *Hall v. Vance County Bd. of Educ.* 774 F .2d 629, 633 n. 3 (4th Cir.1985).[15]thus, the only "appropriate" type of monetary relief available under the IDEA is restitution or reimbursement.[16]In other words, courts have uniformly limited appropriate" relief under the IDEA to "repayment" as opposed to "general" damages.

Accordingly, as a matter of law, the IDEA affords no basis for plaintiffs claim for compensatory and punitive damages. It follows, of course, that due process hearing

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[15] See also *Crocker v. Tennessee Secondary Sch. Athletic Ass'n.* 980 f.2d 382, 386 (6th Cir. 1992) ("In this case, general damages for emotional anguish ... do not constitute 'appropriate' judicial relief."); *Anderson v. Thompson,* 685 f.2d 1205, 1210-11 (7th Cir.1981) ("Viewing the language of section 615(e)(2) in the context of section 615 leads us believe that Congress did not envision appropriate relief generally to include a damage remedy."); *Barnett v. Fairfax County Sch. Bd.,* 721 F.Supp. 755, 756 (E.D.Va. 1989) ("[I]t has been clearly established that aside from reimbursement to parents for private tuition, compensatory damages are not recoverable under [the IDEA]."), *AFFD,* 927 F.2D 146 (4th Cir.), *Cert. denied,* 502 U.S. 859, 112 S.Ct. 175, 116 L.Ed.2d 138 (1991).

[16] *See Burlington School Committee,* 471 U.S. at 370-71, 105 S.Ct. at 2002-2003 (holding that the IDEA merely permits plaintiffs to recover "reimbursement [of]...expenses that the [municipal government] should have paid all along and would have borne in the first instance had it developed a proper IEP").

officers have no statutory authority under the IDEA to award such relief.

B

Plaintiff's reliance on § 514 of the Rehabilitation Act of 1973 fares no better.

[2-5] Unlike the IDEA, § 504 focuses not on creating rights and entitlements but on proscribing certain discriminatory acts.[17] As the Third Circuit put it, "[w]hile the IDEA is phrased in terms of a state's affirmative duty to provide a free appropriate public education, § 504 is worded as a negative prohibition against disability discrimination in federally funded programs."[18] To establish a violation of § 504 in this context, a plaintiff must demonstrate that: (1) he is a person with a disability as defined by the Act; (2) he is "otherwise qualified" to participate in school activities; (3)

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[17] Specifically, § 504 provides, in pertinent part, that:

No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial assistance...

29 U.S.C. § 794(a).

[18] *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir. 1995); *see also Smith v. Robinson*, 468 U.S. 992, 1016, 104 S.Ct. 3457, 3471, 82 L.Ed.2d 746 (1984) ("Section 504 and the [IDEA] are different substantive statutes. While the [IDEA] guarantees a right to a free appropriate public education, section 504 simply prevents discrimination on the basis of [disability].").

defendants received federal financial assistance; and (4) he was subject to discrimination solely on the basis of his disability.[19] In sharp contrast to the IDEA, it is well-established that monetary damages are an available remedy under § 504.[20] Nevertheless, to recover such damages, a plaintiff must show intentional discrimination or bad faith in the denial of special education.[21]

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[19] *See Johnson v. Thompson*, 971 F.2d 1487, 1492 (10th Cir.1992) (quoting *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983)), *cert. denied*, 507 U.S. 910, 113 S.Ct. 1255, 122 L.Ed.2d 654 (1993).

[20] *See, e.g., Pandazides v. Virginia Bd. of Educ.*, 13 F.3d. 823, 830 (4th Cir.1994) (concluding "that Congress has not overturned the presumption towards the full panoply of damages in the case of § 504"); *see also Rodgers v. Magnet Cove Public Schools.*, 34 F.3d. 642, 645 (8th Cir.1994)(holding that "money damages are available under § 504"); *Waldrop v. Southern Co. Services. Inc.*, 24 F3d. 152, 157 (11th Cir.1994) ("[S]uits under § 504 provide to plaintiffs the full spectrum of remedies..."); *Smith v. Barton*, 914 F.2d 1330, 1338 (9th Cir.1990)(citation omitted)(finding that "plaintiffs suing under section 504 of the Rehabilitation Act 'may pursue the full panoply of remedies, including ... monetary damages'"), *cert. denied*, 501 U.S. 1217, 111 S.Ct. 2825, 115 L.Ed.2d 995 (1991).

[21] *See Pandazides*, 13 F.3d at 830 n. 9 ("We[] hold that requiring a finding of 'intentional discrimination' to make out a violation of § 504 that supports a damages remedy places this case within the group of cases generally referred to as 'disparate treatment' cases."); *see also Heidemann v. Rother*, 84 F.3d 1021, 1032 (8th Cir. 1996) (citation omitted) (holding that "'either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of [] children [with disabilities]... '"); *Whitehead v. School Bd. for Hillsborough County, Fla.* 918 F.Supp. 1515 (M.D.Fla.1996) ("Following ... the Supreme Court's treatment of damages under Title VI,

[6] Here, Kristopher alleges no facts that might support an inference that defendants acted in bad faith or with an intent to deprive him special education services. Instead, the gravamen of plaintiffs allegations is that defendants' negligent failure to identify his LD in a timely manner deprived him special education services, thereby discriminating against him on the basis of disability. These allegations, however, cannot support a § 504 violation. To hold otherwise would distort and subvert the plain and intended meaning of "discrimination," ignore settled precedent, and invite a flood of unwarranted litigation in the special education context. The fact is, as the Eight Circuit has noted, that the evaluation of LD is a best an inexact science on which few experts agree.[22]

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this Court holds that damages are available under § 504 for intentional discrimination."); *Barnett*, 712 F.Supp at 756 ("This court is of the view that before damages can be sought for basic education claims such as those under § 504, there must be a showing of bad faith or intentional discrimination").

[22] According to the Eighth Circuit:

> The reference in the Rehabilitation Act to "discrimination" must require, we think, something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist. Experts often disagree on what the special needs of a [] child [with a disability] are and the educational placement of such children is often necessarily an arguable matter. That a court may, after hearing evidence and argument, come to the conclusion that an incorrect evaluation has been made, and that a different placement must be required under [IDEA] is not necessarily holding that a[] child [with a disability] has been discriminated against solely by reason of his or her [disability]. An evaluation, in other words, is not discriminatory merely because the court wanted the child evaluated differently.... We think, rather, that either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of the

Where the § 504 standard expanded to include mere negligence, many LD cases would be converted to § 504 discrimination claims for damages based on contentions that the LD should reasonably have been identified and accommodated semesters or years earlier. This is a result Congress, in enacting § 504, neither intended nor allowed.

In sum, Kristopher has alleged no facts that would support a claim of bad faith or gross misjudgment on the part of defendants in failing to identify and provide for his LD sooner. Consequently, Kristopher's claim for compensatory and punitive damages under § 504 fails.

C

Plaintiff's § 1983 claim also fails to state a claim.

[7] Section 1983 provides a civil remedy for acts taken under color of law that deprive "any citizen of the United States or person within the jurisdiction thereof" of "rights,privileges, or immunities secured by the Constitution and laws."[23] In other words, "[s]ection 1983 does not confer substantive rights, but merely redresses the deprivation of

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education of [] children [with disabilities]. *Monahan v. State of Neb.*, 687 F.2d 1164, 1170-71 (8th Cir.1982), *cert denied*, 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983).

[23] 42 U.S.C. § 1983; *Maine v. Thiboutot*, 448 U.S. 1, 5,6, 100 S.Ct. 2502, 2504-06, 65 L.Ed.2d 555 (1980) ("Section 1983 encompasses claims based on purely statutory violations of federal laws.").

those rights elsewhere secured."[24] When the secured right at issue is based on a statute, the statute itself must not foreclose § 1983 enforcement. The IDEA does not restrict such actions because it contains nonexclusive remedy provision, § 1415(f).[25]

[8] Although violations of the IDEA and § 504 are independently enforceable under § 1983,[26] "that section is a derivative cause of action, creating a private right of action only for deprivation of federal rights enunciated elsewhere."[27] In other words, to state a claim for compensatory and punitive damages under § 1983 for violations of the IDEA and § 504, a plaintiff must, at a minimum, state such a claim under the

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[24] *W.B.*, 67 F.3d at 493.

[25] 20 U.S.C. § 1415(f) provides that :

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under this subchapter, the procedures under subsection (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

[26] *See, e.g. Hoekstra v. Independent Sch. Dist, No. 283*, 916 F.Supp 941, 942 (D.Minn), *aff'd*, 103 F.3d 624 (8th Cir.1996); *Reid v. Board of Educ. Of Lincolnshire-Praire View Sch. Dist., 103*, 765 F.Supp. 965, 969 (N.D.Ill.1991); *Grace B. v. Lexington Sch. Comm.*, 762 F.Supp. 416, 418 (D.Mass.1991); *Blazejewski v. Board of Educ. of Allegany Central Sch. Dist.*, 599 F.Supp. 975, 979 (W.D.N.Y.1985).

[27] *Barnett*, 721 F.Supp. at 757.

IDEA and § 504. This plaintiff has not done. According, the motion to dismiss Kristopher's claim for compensatory and punitive damages under § 1983 must be granted.

D

Kristopher's § 1985 claim merits the same fate.

[9] It is well-settled that 42 U.S.C. § 1985(3)[28] protects persons only from conspiracies motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971); *see also Pratt v. Thornburgh*, 807 F.2d 355, 357 (3dCir.1986). The complaint contains no factual allegation that defendants' purported deprivation of plaintiffs rights under the IDEA stemmed from any proscribed conspiratorial intent. Accordingly, Kristopher's claims for compensatory and punitive damages under § 1985 must also fail here.

E

Kristopher's constitutional Fourteenth Amendment due process and equal protection claims are also fundamentally flawed.

[10] It is well-settled that education is not a

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[28] This provision prohibits a conspiracy formed "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal protection of the laws, or of equal privileges and immunities under the laws..."

fundamental right secured by the Constitution and, thus, defendant's purported failure to provide Kristopher with the most appropriate education is not a constitutional deprivation. *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Moreover, defendants aptly point out that Kristopher's compliant also fails to allege unequal treatment relative to either LD students or non-LD students. Accordingly, any constitutional claim premised on the Fourteenth Amendment must be dismissed.

F

[11,12] Although Kristopher's complaint refers to violations of Virginia Law, he cites no pertinent Virginia statute and appears instead to rely on a Virginia common law tort of educational malpractice. Yet, the Supreme Court of Virginia has never recognized such a cause of action and it would be inappropriate for this Court to do so in the first instance, for "this Court must await the [] decision [of the Virginia General Assembly and the Virginia Supreme Court] before it may" recognize a new cause of action. *White v. Federal Exp. Corp.*, 729 F.Supp. 1536, 1550 (E.D.Va.1990),*affd*, 939 F.2d 157 (4thCir.1991).[29] It is well-

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[29] *See Perry v. McVey*, 345 F.2d 897, 901 (4thCir.1965)("In light of the oft repeated authoritative declarations of the Court of Appeals of Maryland, any change in the law must come from the independent authority of the state, not from a federal court which is bound to apply state law in a diversity suit."); *Gravins v. International Playtex, Inc.*, 586 F.Supp. 251, 252 (E.D.Va.1984)("As long as representative government exists, there is no excuse for a court arrogating to itself the authority to move the law along some purportedly wise or socially desirable path.")

settled that federal courts have "a duty to apply state law as [they] find it," even where the state rule is " contrary to the trend in other jurisdictions and of debatable wisdom." *Fleming v. Asbill*, 42 F.3d 886, 890 (4thCir.1994). Accordingly, Kristopher's claim based on Virginia common law fails to state a cognizable claim.

Nor is there any good reason to expect that the Supreme Court of Virginia would conclude otherwise in this case. While there is abundant academic commentary in support of educational malpractice suits,[30] There is overwhelming judicial authority in opposition to such tort claims. And this is understandable given the weighty policy considerations militating against such suits. Thus, educational malpractice cases typically fit into one of three general categories. In the first, and most prevalent type of education malpractice action, a student alleges that his her school negligently failed to provide adequate or sufficient academic instruction in basic skills, such as reading or writing.[31] In the

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[30] *See e.g.,Sharan E. Brown & Kim Cannon, Educational Malpractice Actions: A Remedy for What Ails Our Schools?, 78 ED. L. REP. 643 (1993; John Culhane, Reinvigorating Educational Malpractice CLaims: A Representational Focus, 67 WASH. L. REV. 349 (1992); Johnny C. Parker, Educational Malpractice: A Tort is Born, 39 CLEV. ST. L. REV. 301 (1991); J. Elson, A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching, 73 Nw. U.L. REV. 641 (1978).*

[31] See e.g., *Ross v. Creighton University*, 957 F.2d 410 (7th Cir. 1992)(rejecting a former student-athlete's claim that Creighton University "committed `educational malpractice' by not providing him with a meaningful education and preparing him for employment after college");

second category, a student claims that he or she was erroneously diagnosed as having a mental disability and, then, detrimentally placed by school officials in an inappropriate special education program.[32] In the third class of cases, a

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Blane v. Alabama Commercial College. Inc., 585 So.2d 866 (Ala.1991) (affirming the dismissal of the negligence claim brought by a former typing student "who was unable to find employment in the computer/clerical field"); *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal.App.3d. 814, 131 Cal.Rptr. 854 (1976) (holding that plaintiff's complaint, which alleged that defendants "negligently and carelessly failed to provide [him] with adequate instruction, guidance, counseling, and/or supervision in basic academic skills," failed to state a cause of action); *Moore v. Vanderloo,* 386 N.W.2d 108 (Iowa 1986) (rejecting plaintiff's claim that her chiropractor's college "should be held liable under a negligence theory for failure to teach" that neck manipulation could cause strokes); *Wickstrom v. North Idaho College*, 111 Idaho 450, 725 P.2d 155 (1986) (declining to recognize the doctrine of educational malpractice in a case brought by "students who successfully completed `Maintenance Mechanic' courses" but who were nonetheless not qualified as entry level journeymen); *Finstad v. Washburn University of Topeka*, 252 Kan. 465, 845 P.2d 685 (1993) (denying court reporting students' lawsuit that Washburn was negligent "in the conduct and supervision of the court reporting program"); *Donohue v. Copiague Union Free School District*, 47 N.Y.2d 440, 418 N.Y.2d 375, 391 N.E.2d 1352 (1979) (dismissing plaintiff's negligence claim "that notwithstanding his receipt of a certificate of graduation he lacks even the rudimentary ability to comprehend written English on a level sufficient to enable him to complete applications for employment;).

[32] *See e.g. Smith v. Alameda County Social Servs. Agency*, 90 Cal.App.3d 929, 153 Cal.Rptr. 712 (1979) (denying plaintiff's claim against state agency "for negligently construing tests administered to [him] as indicating mental retardation"); *Tubell v. Dade Conty Public Schs.*, 419 So.2d 388 (Fla.Dist.Ct.App.1982) (holding that plaintiff's

student asserts that school officials negligently failed to diagnosis and treat his or her disability.[33]

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educational malpractice complaint, which alleged "a mistesting and misclassification resulting in [his] being placed in an improper special educational program for a number of years to his detriment," failed to state a cause of action); *Doe v. Board of Educ. of Montgomery County*, 295 Md. 67, 453 A.2d 814 (1982) (dismissing the negligence claim of a former student and his parents against the county board of education for improperly evaluating him as being retarded and for placing him in a "brain injured class"); *Hoffman v. Board of Educ. of the City of New York*, 49 N.Y.2d 121, 424 N.Y.S.2d 376, 400 N.E.2d 317 (1979) (dismissing a student's complaint that the school's negligent assessment of his intellectual capability "caused him to be misclassified and improperly enrolled in the [Children with Retarded Mental Development] program"); *Agostine v. School Dist. of Philadelphia*, 106 Pa. Cmwlth. 492, 527 A.2d. 193 (affirming the dismissal of a student's claim that the school district's psychologist and teachers negligently diagnosed her a educable mentally retarded (EMR) and improperly placed her in special education classes for such EMR children), *aff'd* 517 Pa. 610, 536 A.2d 1334 (1987).

[33] *See, e.g., D.S.W. v. Fairbanks North Star Borough Sch. Dist.*, 628 P.2d 554 (Alaska 1981) (affirming the lower court's dismissal of the students' claims that their school "fail[ed] to discover [their] learning disabilities or fail[ed] to provide [them] and appropriate educational program once [their] learning disabilities [we]re discovered"); *Brantley v. District of Columbia*, 640 A.2d 181 (D.C.App. 1994) (denying the educational malpractice claim of a student who spent three years in second grade before the school district properly identified her learning disabilities and "provide[d] her with education suitable to her needs"); *Rich v. Kentucky Country Day, Inc.*, 793 S.W.2d 832 (Ky.Ct.App.1990) (upholding the dismissal of a father's claim that his son's private school "was negligent in failing to diagnose (the son's) alleged psychological deficit" and "in. . .failing to provide him with a personalized educational program adopted to that condition"); *Hunter v. Board of Educ. Of Montgomery County*, 292 Md. 481, 439 A.2d 582 (1982) (holding that

But for the lone exception of the Supreme Court of Montana,[34] the federal and state courts that have considered all three types of educational malpractice claims have unanimously declined to recognize them as valid causes of action. These decisions have identified numerous public policy considerations for not entertaining such claims. The first consideration is "the lack of a satisfactory standard of care by which to measure an educator's conduct."[35] The second is the inherent difficulty concerning the cause and

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parents' malpractice complaint against "the school system for negligently evaluating) their son's) learning disabilities" could not be maintained); *Suriano v. Hyde Park Cent. Sch. Dist.*, 203 A.D.2d 553, 611 N.Y.S.2d 20(1994) (dismissing plaintiff's claim that his school breached a duty of care ... by promoting him from the first grade through the third grade despite his poor academic performance, by failing to detect a purported learning disability ..., (and) by failing to place him in a special education program to treat his learning disability")

[34] Only Montana has recognized the tort of educational malpractice. *See B.M. v. State*, 200 Mont. 58, 649 P.2d 425 (1982). There, the court held that "school authorities owed the [plaintiff] a duty of reasonable care in testing and placing her in an appropriate special education program." *Id.* at 427. Other courts, however, have criticized the *B.M.* decision for "not recognizing or distinguishing [contrary case law] in the majority opinion." *Moore*, 386 N.W.2d at 114 n. 1. *See also Brantley*, 640 A.2d at 183 n. 4 (criticizing the Montana Supreme Court's decision for containing "no discussion of precedents from other jurisdictions")

[35] *Moore*, 386 N.W.2d at 114; *see also Peter W.*, 60 Cal.App.3d at 824, 131 Cal.Rptr. 854 ("Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury."); *Swidryk*, 493 A.2d at 642 ("[T]he conflicting theories of the science of pedagogy prevented the construction of a workable rule of care.").

nature of damages.[36] The third is reluctance to monitor the internal affairs and day-to-day operations of educational institutions.[37] And the fourth is fear of excessive litigation.[38]

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[36] *See, e.g., Donohue*, 418 N.Y.S.2d 375, 391 N.E.2d at 1355 ("Factors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning. Indeed, as the majority observes proximate cause might `be difficult, if not impossible, to prove.'") (Wachtler, J., concurring); *Swidryk*, 493 A.2d at 642 ("[F]ailure in schools could stem from a variety of factors including the student's physical, neurological, emotional, cultural and environmental background, as well as the actual system itself.")

[37] *See, e.g., Suriano*, 203 A.D.2d at 554, 611 N.Y.S.2d 20 ("In numerous cases, many of which involved allegations substantially similar to those in the matter at bar, the courts of this State have repeatedly refused to entertain educational malpractice causes of action because public policy precludes judicial interference with the professional judgment of educators and with educational policies and practices."); *Donohue*, 418 N.Y.S.2d 375, 391 N.E.2d at 1354 ("To entertain a cause of action for `educational malpractice' would require the courts not merely to make judgments as to the validity of broad educational policies--a course we have unalteringly eschewed in the past--but, more importantly to sit in review of the day-to-day implementations of those policies."); *Hunter*, 439 A.2d at 585 ("[T]o allow petitioners' asserted negligence claims to proceed would in effect position the courts of this State as overseers of both the day-to-day operation of our educational process as well as the formulation of its governing policies.")

[38] *See, e.g., Ross v. Creighton University*, 740 F.Supp. 1319, 1329 (N.C.Ill.1990) (citations omitted)("If every failed student could seek tort damages against any teacher, administrator and school he feels may have shortchanged him at some point in his education, the courts could be deluged and schools shut down."), *aff'd*, 957 F.2d 410 (7th Cir.1992); *Peter W.*, 60 Cal.App.3d at 825, 131 Cal.Rptr. 854 ("To hold [schools] to

It is for the Virginia General Assembly and the Supreme Court of Virginia, not this Court, to weigh and evaluate these policy considerations and decide whether to recognize an action for educational malpractice. In the circumstances, then, Kristopher's claim, insofar as it relies on state common law, must be dismissed.

For the foregoing reasons, defendants' motion to dismiss should be granted and plaintiffs' complaint dismissed in its entirely.

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an actionable `duty of care,' I in the discharge of their academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers.")

VIRGINIA:

STATE EDUCATION APPEAL
STATE-LEVEL REVIEW

Mr. & Mrs. Alan Sellers,	)NUNC PRO TUNC
	) September 6, 1996
Appellants,	)
	)
In Re: Kristopher Sellers	)
	)
v.	)
	)
MANASSAS CITY	)
PUBLIC SCHOOLS	)
	)
Appellees.	)

Decision

SUMMARY: This matter is before me as a State Reviewing Hearing Officer under the procedures for a review of the decision of Hearing Officer R. Mather Archer contained in his June 3, 1996 ADDENDUM TO PREHEARING REPORTS.

FINDING OF FACT: The parents of Kristopher Sellers had requested a due process hearing alleging the denial by Manassas City Public Schools of his right to a free appropriate public education. All educational issues have been settled, compromised, agreed upon, and therefore, are ended. The only other factual finding that can be made from the record is that the student did not receive special

education services prior to 1996. There was no evidence taken, there is no transcript and no documents have ever been formally admitted into evidence.

ISSUE: The sole issue is whether or not the Hearing Officer was correct in his determination that no authority exists allowing a hearing officer in a due process hearing either under the IDEA or Section 504 of the Rehabilitation Act, or 42 U.S.C. Section 1983, as amended, or in any combination, to award compensatory and/or punitive damages.

DISCUSSION: I must initially give the utmost of credit to counsel for parents of this young man for his very inclusive and appealing argument and supportive position that compensatory and punitive damages are available. I might well agree that it makes good sense that hearing officers should have such authority. However, I find absolutely that no such authority exists.

After my review and reading of the various cases cited in the briefs, and letter briefs as put forth by the parties, I find it unnecessary to elaborate in discussion any further. The Hearing Officer's decision was correct. I completely ratify and adopt as my own his decision of June 3, 1996. I also adopt as my own herein the Hearing Officer's reasoning and discussion surrounding his decision.
CONCLUSION AND ORDER: The request for compensatory and/or punitive money damages is denied and, to the extent that it has been made, the request for any hearing thereabout is DENIED. This review is CLOSED.

I hereby certify this opinion, this 10th day of

October, 1996, with copies being sent, via regular U.S. Mail, to the recipients indicated below.

//s//

Reviewing Officer

William S. Francis, Jr.
Forest Financial Building
7110 Forest Ave., Suite 206
Richmond, Virginia 23226
804-288-4004

cc: Mr. and Mrs. Alan Sellers
Paul S. Dalton, Esquire
Mr. James E. Upperman, Div. Super.
Kathleen S. Mehfoud, Esquire
Mr. Anthony Lodovico
Ms. Brenda F. Briggs, Coordinator Due Process Proceedings

June 3, 1996
ADDENDUM TO PREHEARING REPORT

Manassas City
Public Schools
School division

Alan & Sheri Sellers
Parents

James E. Upperman
Superintendent

Kristopher Sellers
Child

Kathleen S. Mehfoud,
Esq., Counsel for Sch.

Paul S. Dalton, Esq.
Counsel for Parents

F. Mather Archer
Hearing Officer
Hearing

Mr. and Mrs. Sellers
Party Initiating

Hearing Requested
3/15/96

Hearing Officer
3/19/96

ISSUES AND PURPOSE OF THE HEARING

The Parents requested a due process hearing for a determination whether their son, Kristopher, has been denied a free appropriate public education by the Manassas City Public Schools (Schools) by a failure to identify and address his learning and emotional disabilities.

As noted in my Prehearing Report of May 13, 1996, all educational issues have been settled, and only two issues remain, viz:

1. Are compensatory and punitive money damages within the purview of the due process hearing and the authority of the hearing officer under the IDEA?
2. If so, are the Parents entitled to money damages?

REQUIRED FINDINGS ON SPECIFIC STATUTORY ISSUES.

For the sake of completeness, whether necessary or not in view of settlement of the educational issues, I address at the outset the following four issues:

A. Were the requirements of notice to the Parents Satisfied.

On the record and by virtue of the settlement agreement, all notice requirements have been met.

B. Does Kristopher have a disability?

As reflected in the parties' settlement agreement. Kristopher is both learning disabled and emotionally disables.

C. Does Kristopher need special education and related services?

On the record and by virtue of the parties' settlement agreement, Kristopher does need special education and related services.

D. Is Manassas City Public Schools providing Kristopher with a free appropriate public education?

On the record and by virtue of the parties' settlement agreement, the Schools are providing Kristopher with free appropriate public education.

DECISION ON THE REMAINING ISSUES:

The parties have duly file their briefs and reply briefs on the remaining two issues, and my decision on those issue is set forth below. As noted in the May 13th Prehearing Report, an affirmative decision on Issue No. 1 will generate a hearing on Issue No. 2, regarding the Parent's entitlement to money damages; while a negative decision in Issue No. 1 will be dispositive of the question of money damages.

ON ISSUE NO. 1.

Are compensatory or punitive damages, or both, within the purview of the due process hearing and the authority of the hearing officer under the IDEA, or Section 504 of the Rehabilitation Act of 1973 (Sec. 504 or 504) or 42 U.S.C.A. 1983 (Section 1983 or 1983), as amended?

It is the decision of this hearing officer, after a careful review of the statutes and cases cited in the briefs of the parties, that money damages cannot be awarded to parents by the hearing officer in a due process hearing under the IDEA. It is further concluded that due process hearing (and mediation) and the educational remedies (including compensatory education), whereby the rights of disabled children to a FAPE might be protected and effected; but money damages are not provided as an additional remedy. Therefore, none can be claimed or awarded solely by virtue of the rights and authority granted by the IDEA.

The IDEA does grant a right of appeal to, or to bring a civil action in, a court of law from an adverse ruling under the administrative process by hearing or review officer, per Sec. 1415(e)(1) and (2). In addition, the IDEA through Sec. 1415(f), grants to the law courts (but not to the due process hearing officer), upon an appeal or in a direct lawsuit after exhaustion of administrative remedies,

the authority to award money damages claimed under 504 or 1983, which was previously denied even to a court of law in cases brought under the IDEA, per *Smith*.

But, whereas money damages are without purview of the impartial due process hearing and the authority of the hearing officer under the IDEA, compensatory education, is within the authority of the hearing officer to award. There is no longer any question that a hearing officer in a due process hearing under the IDEA may award compensatory education. (*See, Harris v. D.C.*, 19 IDELR 105 (D.D C. 1992). But authority to award compensatory education to ensure that a disabled child obtains a FAPE does not carry with it the authority to award money damages.

In view of the settlement of the education issues reached by the parties, the question of compensatory education is not before me. Compensatory education is very much a part of the services to be considered for Kristopher, and from a reading of the IEP appears to be waiting in the wings for his record in the 10th grade. A review of the IEP in due course might point to a need for compensatory education; but it might, as well indicate the opposite. The parties must be prepared to consider that remedy.

In any event, the above decision in this case on the question of money damages is dispositive of Issue No. 2, and there is no need for the hearing now set for June 6, 1996.

The matter of the statute of limitations has been raised by the Schools. However, the settlement of the educational issues and this decision foreclosing an award of money damages in this due process hearing render the question of limitations moot.

Nevertheless, in the view of this hearing officer, the "catch-all" statue of limitations (Code of Va., Sec. 8.01-248), as far as the educational issues are concerned, begins to run when the parents become aware of their child's educational disability. *Richards v. Fairfax County School Board*, 798 F. Supp. 338, 340-341 (E.D. Va. 1992). Otherwise, there would be little need for compensatory education if the schools were to drop the ball in the child find stage.

ORDER

The request for compensatory and punitive money damages is denied. The hearing set for June 6, 1996, is canceled, and this impartial due process hearing is closed.

APPEAL INFORMATION

An appeal of this decision by either party must be instituted within thirty (30)administrative working days, following the date below, by request made to the Virginia Department of Education.

_____ //s//
R. Mather Archer
Hearing Officer

cc: Counsel for Parties
LEA Dir. Special Education
Due Process Coordinator

IN THE JUVENILE AND DOMESTIC RELATIONS
DISTRICT COURT OF PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA

IN RE: KRISTOPHER SELLERS CASE NO.
J-534482-02-00

ORDER

UPON consideration of the Motion to Dismiss the Petition, filed by counsel for Kristopher Sellers, appearing to the court that the interest and welfare of the minor child would best be served if the petition was dismissed,*

it hereby this 29th day of March, 1996,

ORDERED, that the petition filed In RE: Kristopher Sellers Case Number: J 534482 02-00, is hereby dismissed.

//S//
Judge

*Without prejudice should child be truant without just cause.

U.S. Const. amend. XIV provides in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 (1994) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Rehabilitation Act of 1973 §504, 29 U.S.C. § 790 (1994) provides in relevant part:

> No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Individuals With Disabilities Education Act (formerly The Education for All Handicapped Children Act) (1975) , as amended by Act of June 4, 1997, 20 U.S.C. § 1412; 34 C.F.R. §300.125 provides in relevant part:

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met: (2)(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

Individuals With Disabilities Education Act (formerly The Education for All Handicapped Children Act) (1975), as amended by Act of June 4, 1997, 20 U.S.C. §1415(l); 34 C.F.R. 300.512 (d) provides:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V or the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) , or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted tot he same extent as would be required had the action been brought under this subchapter.

Individuals with Disabilities Education Act (formerly the Education for All Handicapped Children Act) (1975), as amended by Act of June 4, 1997, 20 U.S.C. §1415(m); 34 C.F.R. §300.517 provides:

A State that receives amounts from a grant under this part may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)---

(A) the public agency shall provide any notice

required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this part transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this part transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

Individuals with Disabilities Education Act (formerly the Education for All Handicapped Children Act) (1975), as amended by Act of June 4, 1997, 20 U.S.C. § 1415 (i)(2)(A) provides:

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

Supreme Court, U.S.
FILED
AUG 13 1998
CLERK

No. 98-79

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1998

KRISTOPHER SELLERS, by his
parents Alan and Sherri Sellers
and ALAN and SHERRI SELLERS,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF MANASSAS,
VIRGINIA and
JAMES E. UPPERMAN, SUPERINTENDENT OF THE
SCHOOL BOARD OF THE CITY OF MANASSAS,
VIRGINIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Kathleen S. Mehfoud (VSB No. 18096)
D. Patrick Lacy, Jr. (VSB No. 07190)
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QUESTIONS PRESENTED

1. Whether monetary damages are available under the IDEA for the alleged failure to identify a student as disabled in his earlier school years.

2. Whether monetary damages are available under Section 504 of the Rehabilitation Act of 1973 for the alleged failure to identify a student as disabled in the absence of allegations of bad faith, fraud or intentional misconduct.

3. Whether a plaintiff may sue under Section 1983 for an alleged IDEA violation even though the IDEA has a comprehensive remedial scheme for violations of its own requirements and in the absence of clear statutory authority allowing such lawsuits.

4. Whether the plaintiff failed to plead the necessary elements of a Section 1983 cause of action.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CITATIONS iv

STATEMENT OF THE CASE 2

A. Procedural History 2
B. Factual Background 5

REASONS FOR DENYING THE WRIT 8

A. COMPENSATORY AND PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER THE IDEA. 8

B. NO CLAIM HAS BEEN STATED UNDER THE REHABILITATION ACT OF 1973 14

C. THE FOURTH CIRCUIT CORRECTLY HELD THAT THE SELLERS CANNOT SUE UNDER SECTION 1983 FOR ALLEGED IDEA VIOLATIONS. 19

1. The Statutory Language and Legislative History Do Not Permit Section 1983 Claims Based on IDEA Violations 19

2. Congress Has Not Unambiguously Prohibited Section 1983 Claims for Alleged IDEA Violations, as Required by the Spending Power 21

D. THE SELLERS HAVE NOT STATED A CLAIM UNDER SECTION 1983 . . . 24

CONCLUSION 25

TABLE OF CITATIONS

PAGE

Cases

Alexander v. Choate, 469 U.S. 287 (1985) 15, 17

Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589 (4th Cir. 1997) 23

Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981) 12

Barnett v. Fairfax County Sch. Bd., et al., 721 F. Supp. 755 (E.D. Va. 1989), aff'd, 927 F.2d 146 (4th Cir. 1994) 11, 16

Board of Educ. v. Rowley, 458 U.S. 177 (1982) 21

Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) 15

Bryan County Comm'r v. Brown, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) . 24, 25

Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359 (1985) 9, 10

Charles F. v. Board of Educ. of Skokie Sch. Dist. 68, 98 F.3d 989 (7th Cir. 1996) . . . 9, 12, 23

City of Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981) 25

Colin K. v. Schmidt, 715 F.2d 1
(1st Cir. 1983) 11, 16, 17

Commonwealth of Virginia Dep't of Educ. v.
Riley, 106 F.3d 559 (4th Cir. 1997)
(en banc) 21-23

Crocker v. Tennessee Secondary Sch. Athletic
Ass'n, 980 F.2d 382 (6th Cir. 1992) 12, 23

Ezratty v. Commonwealth of Puerto Rico,
648 F.2d 770 (1st Cir. 1981) 11

Florence County Sch. Dist. Four v. Carter,
510 U.S. 7 (1993) 9, 10

Franklin v. Gwinnett County Pub. Schs.,
503 U.S. 60 (1990) 10, 11

Grzan v. Charter Hosp. of Northwest Ind.,
104 F.3d 116 (7th Cir. 1997) 14, 16

Hall v. Vance County Bd. of Educ.,
774 F.2d 629 (4th Cir. 1985) 11

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 25

Heidemann v. Rother, 84 F.3d 1021
(8th Cir. 1996) 13, 18, 23

Hoekstra v. Independent Sch. Dist., No. 283, 103 F.3d 624 (8th Cir. 1996), cert. denied, 117 S. Ct. 1852 (1997) 17

Johnson v. Thompson, 971 F.2d 1487 (10th Cir. 1992), cert. denied, 507 U.S. 910 (1993) 14, 16

Kelly v. Boeing Petroleum Servs., 61 F.3d 350 (5th Cir. 1995) 17

Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577 (D.C. Cir. 1984) 14

Manecke v. School Bd. of Pinellas County, 762 F.2d 912 (11th Cir. 1985), cert. denied, 474 U.S. 1062 (1986) 13

Marvin H. v. Austin Ind. Sch. Dist., 714 F.2d 1348 (5th Cir. 1983) 12, 17

Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982) 13, 14

Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658 (1978) 24

Moreno v. Consolidated Rail Corp., 99 F.3d 782 (6th Cir. 1995) 18

Pandazides v. Virginia Bd. of Educ., 13 F.3d 823 (4th Cir. 1994) 16

Pennhurst State Sch. v. Halderman,
451 U.S. 1 (1981) 22

Pesterfield v. Tennessee Valley Auth., 941 F.2d 437
(6th Cir. 1991) 17

Powell v. Defore, 699 F.2d 1078 (11th Cir. 1983) . . . 13

Praino v. Board of Educ. of Wappingers Cent.
Sch. Dist., 1997 U.S. App. LEXIS 8106
(2nd Cir.), cert. denied, 118 S. Ct. 222 (1997) . 11

Shevtsov v. Los Angeles Unified Sch. Dist.,
et al., 1998 U.S. App. LEXIS 949
(9th Cir. 1998) 13, 23

Smith v. Robinson, 468 U.S. 992 (1984) 15, 20

Southeastern Community College v. Davis,
442 U.S. 397 (1979) 15

Thompson v. Board of the Special Sch. Dist.
No. 1, et al., ___ F.3d ___, 1998 U.S.
App. LEXIS 9880 (8th Cir. 1998) 12, 17

Timms v. Metropolitan Sch. Dist. of Wabash
County, Ind., 722 F.2d 1310
(7th Cir. 1983) 17

Todd v. Elkins Sch. Dist. 10, 1997 U.S. App. LEXIS
358 (8th Cir. 1997) 13

Tuck v. HCA Health Servs. of Tenn., Inc., 842 F. Supp. 988 (M.D. Tenn. 1992), aff'd, 7 F.3d 465 (6th Cir. 1993), reh'g en banc denied, 1993 U.S. App. LEXIS 25164 (Nov. 19, 1993) 17

United States Dep't of Transp. v. Paralyzed Veterans of America, 477 U.S. 597 (1986) 14

United States v. University Hosp., State Univ. of N.Y. at Stony Brook, 729 F.2d 144 (2d Cir. 1984) 16

W.B. v. Matula, 67 F.3d 484 (3rd Cir. 1995) . 9, 13, 15, 16, 23

Wood v. President and Trustees of Spring Hill College, 978 F.2d 1214 (11th Cir. 1992) 18

Statutes

20 U.S.C. § 1415 . . . . . 10, 20, 23, 24

42 U.S.C. § 1983 . . . . . i, 3, 4, 8, 13, 19-21, 23-25

42 U.S.C. § 1985 3

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA") . . . i-5, 7-14, 16, 18-24

§ 504 of the Rehabilitation Act of 1973 . . i, 3, 4, 8, 14-20

Constitutions

U.S. Const. amend. XIV 3

Other Authorities

Federal Rule of Civil Procedure 12(B)(6) 3

Sup. Ct. R. 12.7 7

No. 98-79

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1998

KRISTOPHER SELLERS, by his
parents Alan and Sherri Sellers
and ALAN and SHERRI SELLERS,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF MANASSAS,
VIRGINIA and
JAMES E. UPPERMAN, SUPERINTENDENT OF THE
SCHOOL BOARD OF THE CITY OF MANASSAS,
VIRGINIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, School Board of the City of Manassas, Virginia, and James E. Upperman, Superintendent, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners in this case.

STATEMENT OF THE CASE

A. Procedural History

The U.S. Court of Appeals for the Fourth Circuit, on April 13, 1998, ruled in favor of the School Board of the City of Manassas, Virginia, and James E. Upperman, Superintendent (collectively referred to an "Respondents"). Petitioners' Appendix at p. 1 (hereafter "A__"). This decision affirmed the district court's decision of April 30, 1997.

This case began with administrative proceedings conducted under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA"). In these proceedings, the Sellers sought monetary damages in the form of compensatory and punitive damages to compensate them based on their allegation that Kristopher Sellers ("Kris") received only regular education services rather than special education services for a number of years. A48. The administrative proceedings did not address any educational issues as the Sellers conceded that they had resolved all educational disputes. They sought only compensatory and punitive damages. A43, A47-49. A decision was entered by the local hearing officer in favor of the school division on June 3, 1996. A46. The local hearing officer found that he had no authority to award monetary damages. A48. An appeal ensued to the state level and the state review hearing officer affirmed the decision of the local hearing officer on October 10, 1996. A43.

When both hearing officers found that they had no authority to award these damages, the Sellers initiated this action in federal court.[1] The complaint was filed by the Sellers individually and on behalf of Kris on November 12, 1996. The complaint alleged violations of the IDEA, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), 42 U.S.C. Sections 1983 and 1985, the Fourteenth Amendment and Virginia law. A26. On December 10, 1996, the defendants, the School Board of the City of Manassas, Virginia and James E. Upperman, Superintendent, filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(B)(6) for failure to state a claim on which relief could be granted. After allowing time for the parties to file initial and supplemental briefs, the District Court on April 30, 1997, granted the motion to dismiss. A23. The district judge found that the Sellers' claim that Kris should have been identified as disabled earlier was in essence a claim for educational malpractice and should be dismissed. Id. This decision is reported at 960 F.Supp. 1006.

The Sellers noted their appeal to the Fourth Circuit on May 28, 1997.[2] The Court heard oral argument on

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[1] Although Kris sued by his parents, the complaint alleges that he is eighteen years of age. Thus, the suit should have been initiated in his own name. There has been no indication through this time that Kristopher wishes to continue prosecuting this suit.

[2] The only person to note an appeal to the Fourth Circuit was Kristopher Sellers. Thus, the Fourth Circuit

January 29, 1998, and ruled in Respondents' favor on April 13, 1998. The Fourth Circuit agreed with the district court that this was a claim for educational malpractice, and that neither compensatory nor punitive damages were available for alleged IDEA violations. A6. Second, the Fourth Circuit agreed with the district court that the Sellers had failed to state a claim under Section 504 because they had not alleged that the Respondents acted with bad faith or gross misjudgment. Instead, the allegations in the complaint amounted to, at best, a negligence claim. A12-13. Finally, the Fourth Circuit held that the a party may not sue under Section 1983 for an IDEA violation, because the IDEA provides a comprehensive remedial scheme for violations of its own requirements. The language of the IDEA and its legislative history do not unambiguously permit plaintiffs to sue under Section 1983 for IDEA violations. A14-21. The district court held that the Sellers had failed to state a claim under the IDEA or Section 504 and, as a result, the Sellers could not maintain a Section 1983 action for IDEA or Section 504 violations. A34-35. The Fourth Circuit's decision is published at 141 F.3d 524.

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lacked jurisdiction with respect to the claim of Sherri Sellers and Alan Sellers. See Thompson v. E.I. DuPont de Nemours & Co., 74 F.3d 530, 532 (4th Cir. 1996). For convenience and consistency with the briefs submitted in the district and appellate courts, Kristopher Sellers as petitioner shall be referred to as plural rather than singular.

B. Factual Background

The Sellers make a number of factual assertions throughout their brief which are nowhere to be found in the record. The Sellers did not include these "facts" in the complaint and these "facts" were not before the trial court for its consideration. The facts which form the basis of this case and as alleged by the Sellers in their complaint are few.

Kristopher Sellers is 18 years old, has been diagnosed as learning disabled and emotionally disturbed, and did not receive special education services prior to the 1995-96 school year. A4, A23-24. Beginning as early as his fourth grade year, Kris' test scores should have alerted the school division of the need to test, assess, evaluate and place him in a special education program. A4, A24. Instead, the school division initiated a truancy petition against Kris, which was dismissed by the Juvenile and Domestic Relations Court of Prince William County on March 29, 1996. A4. It is also implicit in the complaint that Kris began to receive special educational services that were acceptable to his parents.

In subsequent administrative proceedings under the IDEA, the Sellers unsuccessfully sought to recover compensatory and punitive damages based on these assertions. A4, A24-26. The Sellers appealed these adverse determinations to federal court where they were also unsuccessful. A5, A23. These facts constitute the sole basis for the Sellers' claims for compensatory and punitive damages. Considering these facts, the trial and appellate courts correctly

determined that the claim that Kris should have been identified as disabled earlier was nothing more than an educational malpractice claim and did not state a cause of action for compensatory or punitive damages.

Just as they did in their brief presented to the Fourth Circuit, the Sellers try to introduce a number of new facts which are nowhere to be found in the record.[3] The Sellers make these allegations throughout their brief to this Court. In actuality, the "factual" allegations in the brief far exceed the sparse facts set forth in the record and discussed above.[4] The "facts" which are not part of the record, but mentioned by the Sellers in their brief nonetheless, are highlighted in the following discussion so that they are not considered as part of the Sellers' petition.

Specifically, the Sellers allege that Mrs. Sellers made complaints to the school system from the first grade on that Kris needed special education services, but that

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[3] The Sellers had ample time to introduce additional facts into the record had they desired to do so. The parties had two opportunities to brief the case at the trial level. The Sellers could have introduced additional facts via affidavits or moved to amend their complaint during the four and one half months from the filing of the Motion to Dismiss on December 10, 1996, until the ruling by the trial court on April 30, 1997, but did not do so.

[4] It should also be pointed out that some of these so-called "facts" are inaccurate. Respondents do not attempt to respond to the accuracy of these "facts."

Respondents refused to perform the necessary evaluation. Sellers' Brief at p. 6, 14, 17-18, 24. According to the Sellers, Respondents told Mrs. Sellers that Kristopher did not need any services and took no steps to test or identify Kristopher until Mrs. Sellers sought the assistance of counsel. Id. at 6, 24. These "facts" are not in the record and contain no citation to the Appendix. The Sellers also make representations regarding the findings of their experts. Id. at 6. These "facts" were also not in evidence. The Sellers allege that they had Kristopher privately tested, another "fact" not in the record. Id. at 4, 17, 24.

The Sellers also allege a number of violations of their procedural rights. Id. at 11, 17. Once again, this assertion of procedural violations is not in the record and was not a part of any argument made to the trial court. Nor is there any basis for asserting that Kris was offered a "full-time, special education private school with related services to meet his educational needs." Id. at 5. Additionally, in their argument, the Sellers maintain that the school principal was in a position of authority who was well-aware of and participated in the Respondents' alleged IDEA violations. Id. at 22. This is not in the record and was previously argued.

These "facts," which are not supported by the record, should not be considered.[5] The Sellers must

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[5] "In any document filed with this Court, a party may cite or quote from the record." Sup. Ct. R. 12.7. There is no authority allowing the Sellers to cite or quote from any

proceed on the sparse facts which they have alleged in their complaint and which are part of the record.

REASONS FOR DENYING THE WRIT

The petition for certiorari in this matter involves, in essence, three issues decided by the Fourth Circuit. None of these issues warrants review by this Court. First, courts have uniformly held that the IDEA does not provide for compensatory or punitive damages. These conclusions are uniform and legally sound. Second, courts have uniformly held that certain elements must be pleaded and proved to successfully maintain a claim under Section 504. The Sellers failed to plead these minimally necessary elements. Third, the IDEA's statutory framework, clear language, and legislative history prohibit a Section 1983 claim for money damages based on alleged violations of the IDEA. The Fourth Circuit's decision was correct as to this point, especially where, as here, a party fails to plead the requisite elements of a Section 1983 claim. Each of these issues will be examined in detail below.

A. COMPENSATORY AND PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER THE IDEA.

No court has yet held that monetary damages are available for violations of the IDEA. In their attempt to convince this Court otherwise, the Sellers rely on and

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source not in the record or, for that matter, to ignore the record altogether.

misinterpret the decision in W.B. v. Matula, 67 F.3d 484 (3rd Cir. 1995).

The Matula Court determined to the contrary that "the relief sought by plaintiffs in this action [i.e., money damages] was unavailable in IDEA administrative proceedings." Id. at 496. Thus, the Sellers' reliance on Matula is misplaced, because the Matula Court specifically held that money damages are not permitted under the IDEA. The Seventh Circuit shares in this interpretation of Matula. See Charles F. v. Board of Educ. of Skokie Sch. Dist. 68, 98 F.3d 989, 991 (7th Cir. 1996) (citing Matula, 67 F.3d at 496).

The IDEA does not expressly authorize monetary damages as a remedy for violations of its provisions. This Court, in determining what relief is available to prevailing parents under the IDEA, has twice stated that equitable remedies and equitable considerations are appropriate for determining the scope of relief available under the IDEA. See Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359, 374 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 16 (1993). In both of these cases, the Court authorized an award of tuition reimbursement to prevailing parents as an appropriate equitable remedy. Tuition reimbursement is characterized as equitable relief because it compensates the parents for services they provided and paid for and for which the school division was liable and failed to provide. Id. In neither case was the remedy of monetary damages approved as an available remedy under the IDEA.

Equitable relief such as tuition reimbursement is authorized under the IDEA via a court's authority to ". . . grant such relief as the court determines is appropriate." Id.; 20 U.S.C. § 1415(I)(2)(B)(iii).[6] Nowhere in these cases or in the language of the IDEA itself is there approval for the granting of monetary damages. This award would be inconsistent with the directive ". . . that the relief is to be 'appropriate' in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with 'a free appropriate public education . . . .'" Burlington Sch. Comm. v. Board of Educ., supra at 369. An award of monetary damages to one disabled student would limit the availability of funds for other disabled students and limit access to educational services for the very class of students that the law is designed to protect. Thus, the only approved relief under the IDEA is equitable relief, such as tuition reimbursement.

Although the Sellers cite Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1990) as permitting all available relief, including damages, Sellers' Brief at p. 9, this argument is faulty. It ignores the fact that this Court has twice interpreted the IDEA as permitting only equitable relief and that the Carter decision was rendered after Gwinnett. The argument also ignores the fact that with the

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[6] The IDEA was reauthorized by Congress last year and became effective on June 4, 1997. References will be made to the latest provisions of the IDEA. The provisions at issue in this case are unaffected by the reauthorization. A6.

reauthorization of the IDEA last year, Congress did not expand the scope of available relief under the IDEA to include damages. Thus, this argument is meritless. See Gwinnett, 503 U.S. at 73.

The various circuits that have considered the availability of damages under the IDEA have consistently found that there is no basis to award monetary damages. This position has been taken by the First Circuit. See e.g., Ezratty v. Commonwealth of Puerto Rico, 648 F.2d 770, 777 (1st Cir. 1981) (Failure to offer a timely evaluation would not give rise to a claim for damages.); Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983) (Parents are not entitled to compensatory and punitive damages for the school district's failure to provide an appropriate education.). The Second Circuit addressed this issue in the case of Praino v. Board of Educ. of Wappingers Cent. Sch. Dist., 1997 U.S. App. LEXIS 8106, at *4 (2nd Cir.), cert. denied, 118 S. Ct. 222 (1997) and denied monetary damages.

The Fourth Circuit has not only denied monetary damages in IDEA cases, but also held that there is no private cause of action for damages for educational malpractice under the IDEA. See Hall v. Vance County Bd. of Educ., 774 F.2d 629, 633, n. 3 (4th Cir. 1985)("The Act permits a reimbursement remedy, but does not create a private cause of action for damages for educational malpractice."). See also, Barnett v. Fairfax County Sch. Bd., et al., 721 F. Supp. 755, 756 (E.D. Va. 1989) ("[I]t has been clearly established that aside from reimbursement to parents for private tuition, compensatory damages are not

recoverable under [the IDEA]."), aff'd, 927 F.2d 146 (4th Cir. 1994).

Likewise, the Fifth Circuit has refused to allow a claim for compensatory or punitive damages under the IDEA. See Marvin H. v. Austin Ind. Sch. Dist., 714 F.2d 1348, 1356 (5th Cir. 1983) ("[W]e join the Seventh, Eighth and Eleventh Circuits . . . in finding that . . . a damage remedy is not generally consistent with the goals of the statute."). This same position has been affirmed by the Sixth Circuit in the case Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382, 386 (6th Cir. 1992) ("In this case, general damages for emotional anguish . . . do not constitute 'appropriate' judicial relief.").

The Seventh Circuit has also affirmed the unavailability of monetary damages in its decisions. See e.g., Charlie F. v. Board of Educ. of Skokie Sch. Dist. 68, 98 F.3d 989, 991 (7th Cir. 1996) (Disabled student who sought monetary damages from teacher, school principal, and school district superintendent with respect to allegedly misconceived educational strategy was not entitled to damages.); Anderson v. Thompson, 658 F.2d 1205, 1213 (7th Cir. 1981) ("When a school district makes a good faith effort to provide a child with an appropriate education, we do not believe that as a general rule it is good policy to require that a school district pay money damages if it later turns out that a different programming decision should have been made.")

Similar opinions have been given on multiple occasions by the Eighth Circuit. See Thompson v. Board of

the Special Sch. Dist. No. 1, et al., ___ F.3d ___, 1998 U.S. App. LEXIS 9880, at *13 (8th Cir. 1998) ("[A] claim 'based upon defendants' alleged violations of the IDEA may not be pursued in this . . . action because general and punitive damages . . . are not available under IDEA.'") (quoting Heidemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996) (Pain and suffering, emotional distress, and loss of academic opportunities will not give rise to a claim for monetary damages under the IDEA.)); Todd v. Elkins Sch. Dist. 10, 1997 U.S. App. LEXIS 358 (8th Cir. 1997) (Student who fell from unbuckled wheelchair and broke his leg was not entitled to seek monetary damages under the IDEA.); and Monahan v. Nebraska, 687 F.2d 1164, 1169 (8th Cir. 1982) (Damages are not available under the IDEA for an improper placement.).

Finally, the Ninth and Eleventh Circuits have denied monetary damages in IDEA actions. See Shevtsov v. Los Angeles Unified Sch. Dist., et al., 1998 U.S. App. LEXIS 949, at *5-6 (9th Cir. 1998) ("There is no authority for the imposition of [punitive damages and damages for pain and suffering] under the IDEA or, derivatively, under 42 U.S.C. § 1983."); and in the Eleventh Circuit, Manecke v. School Bd. of Pinellas County, 762 F.2d 912, 916 n.2 (11th Cir. 1985), cert. denied, 474 U.S. 1062 (1986)("tort-type damages" unavailable); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983) (Damages are not available under the IDEA for violations of special education laws.).

The Sellers have misinterpreted Matula and cannot cite to any circuit authorizing monetary damages for alleged

IDEA violations. As a result, the Sellers' petition should be denied.

B. NO CLAIM HAS BEEN STATED UNDER THE REHABILITATION ACT OF 1973.

The Sellers cannot avoid the fact that they failed to make out a claim for damages under Section 504. They needed to allege that the Respondents did something more than merely fail to provide a free, appropriate education as required by the IDEA. See, e.g., Monahan, supra at 1170; Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577, 1580 (D.C. Cir. 1984). Specifically, they needed to allege that Kris is a person with a disability as defined by the Act, that he is otherwise qualified to participate in the benefit sought (school activity), that the Respondents received federal financial assistance, and that Kris was subject to discrimination solely on the basis of his disability. See, e.g., Johnson v. Thompson, 971 F.2d 1487, 1492 (10th Cir. 1992), cert. denied, 507 U.S. 910 (1993). The Sellers, however, failed to allege these basic elements. Kris did not allege that he was denied access to special education services solely because he had a disability or that the denial of services was made intentionally or in bad faith.[7]

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[7] Additionally, the Sellers cannot maintain a § 504 claim against defendant Upperman individually, because Upperman is not a recipient of federal funds. See, e.g., Grzan v. Charter Hosp. of Northwest Ind., 104 F.3d 116, 119-120 (7th Cir. 1997) (citing United States Dep't of

The Sellers' complaint alleged only that Kris is disabled, was not identified early enough and was not given access to special education services. The Sellers failed to allege the essential element that this denial of services was due solely to his disability, or that the Respondents engaged in any act which could possibly constitute bad faith or gross misjudgment.[8]

Despite failing to allege the essential elements of their claim, the Sellers rely on facts that are not in the record to draw a parallel between this case and Matula, supra. Sellers' Brief at 17-18. As stated earlier, the complaint did not include allegations of meetings between the parents and Respondents, requests for evaluations, or procedural violations. Yet, the Sellers rely on precisely

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Transp. v. Paralyzed Veterans of America, 477 U.S. 597, 605 (1986).

[8] Section 504 only calls for the "evenhanded treatment of qualified handicapped persons," not "affirmative efforts to overcome the disabilities caused by handicaps." Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979); see also Bowen v. American Hosp. Ass'n, 476 U.S. 610, 640-41 (1986); Alexander v. Choate, 469 U.S. 287, 304 (1985); Smith v. Robinson, 468 U.S. 992, 1018 (1984) ("[Section] 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons."). The Sellers fail to allege that the Respondents' treatment of Kris was due solely to his disability.

these facts when they compare this case to Matula. It is telling that the Sellers admit in their brief to this Court that the complaint "did not reveal in detail the factual bases for the procedural and substantive violations of IDEA and § 504." Id. at 14. The Sellers have not alleged the essential elements of a Section 504 claim, and they cannot now rely on facts outside the record to equate this case with Matula.

Additionally, the denial of access by a disabled student to an educational program set up for disabled students does not prove discrimination based on disability. The Sellers simply alleged that Kris may have been treated differently from other disabled students. However, Section 504 protects against "discriminatory treatment in favor of *non*-handicapped individuals." Grzan v. Charter Hosp. of Northwest Ind., 104 F.3d 116, 122 (7th Cir. 1997)(citing Johnson v. Thompson, supra at 1493)(emphasis added in Grzan). The alleged denial does not involve the denial of a benefit available to non-disabled students and, thus, does not state a claim for discrimination based on disability. See also Colin K. v. Schmidt, supra at 9; United States v. University Hosp., State Univ. of N.Y. at Stony Brook, 729 F.2d 144 (2d Cir. 1984).

Furthermore, in the context of education, in order to make out a claim for monetary damages, the Sellers must prove intentional discrimination. This has been made clear in the Fourth Circuit in Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 830, n. 9 (4th Cir. 1994), and Barnett v. Fairfax County Sch. Bd., supra at 756 ("Before damages can be sought for basic education claims such as those

under Section 504, there must be showing of bad faith or intentional discrimination."). The First Circuit in Colin K v. Schmidt, supra at 10, and the Fifth Circuit in Marvin H., supra at 1357, agree that intentional discrimination is required in a Section 504 claim.

The Sixth Circuit also requires discriminatory intent. Tuck v. HCA Health Servs. of Tenn., Inc., 842 F. Supp. 988 (M.D. Tenn. 1992), aff'd, 7 F.3d 465 (6th Cir. 1993), reh'g en banc denied, 1993 U.S. App. LEXIS 25164 (Nov. 19, 1993). Further, the Fifth and Sixth Circuits have distinguished the case of Alexander v. Choate, 469 U.S. 287 (1985) by holding that Alexander applies "only in regard to disparate impact cases." Pesterfield v. Tennessee Valley Auth., 941 F.2d 437, 443 n.2 (6th Cir. 1991); see also Kelly v. Boeing Petroleum Servs., 61 F.3d 350, 365 (5th Cir. 1995). The Alexander Court had determined that, in disparate impact cases, a plaintiff need not prove discriminatory intent for his Section 504 claim to proceed. Obviously, the Sellers' claim is not a disparate impact claim, and is therefore not governed by Alexander.

The Seventh, Eighth, and Eleventh Circuits also require a showing of intentional discrimination. See Timms v. Metropolitan Sch. Dist. of Wabash County, Ind., 722 F.2d 1310, 1318 n.4 (7th Cir. 1983) (recognized during discussion of exhaustion of remedies); in the Eighth Circuit in Thompson v. Board of the Special Sch. Dist. No. 1, et al., supra at *15 ("[I]n order to make out a prima facie case under . . . Section 504, [the plaintiff] must show bad faith or an exercise of gross misjudgment . . . .") (citing Hoekstra v. Independent Sch. Dist., No. 283, 103 F.3d

624, 626-27 (8th Cir. 1996), cert. denied, 117 S. Ct. 1852 (1997)); Heidemann v. Rother, supra at 1032 (Either gross misjudgment or bad faith should be shown before a Section 504 violation can be made out in the context of education.); and in the Eleventh Circuit, Wood v. President and Trustees of Spring Hill College, 978 F.2d 1214, 1219 (11th Cir. 1992).

In the instant case, the Sellers have alleged nothing more than a mere failure to evaluate and identify at an earlier date. The Fourth Circuit correctly held that these allegations amounted to nothing more than an alleged violation of the IDEA and, at best, a negligence claim. The Courts of Appeals are in unison that such allegations do not state a Section 504 claim.[9] As a result, the petition should be denied.

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[9] Furthermore, the Sellers seek punitive damages for the violations of Section 504 which they have alleged. It is not clear that punitive damages are available as a remedy under Section 504. See Moreno v. Consolidated Rail Corp., 99 F.3d 782 (6th Cir. 1995).

C. THE FOURTH CIRCUIT CORRECTLY HELD THAT THE SELLERS CANNOT SUE UNDER SECTION 1983 FOR ALLEGED IDEA VIOLATIONS.

1. The Statutory Language and Legislative History Do Not Permit Section 1983 Claims Based on IDEA Violations.

The IDEA's comprehensive remedial scheme for violations of its own requirements precludes the Sellers from bringing a Section 1983 based on alleged violations of the IDEA. The statutory language and the legislative history do not provide the necessary unambiguous language which would allow the Sellers to bypass the remedies provided in the IDEA.

The language of the IDEA in question is the following:

> Nothing in this part shall be construed to restrict or limit the rights, procedures and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities . . . .

20 U.S.C. § 1415(f).[10] The provision apples only to the listed statutes and to those other laws protecting the rights of disabled children. Section 1983 is not expressly mentioned and is not aimed at protecting the rights of disabled children. Thus, the IDEA itself does not authorize a suit under Section 1983.

Moreover, there is no legislative history to support the Sellers' view that Congress intended to allow for Section 1983 actions premised on IDEA violations. The House Reports cited by the Sellers indicate an intent to protect the rights of disabled children through the Constitution and the statutes mentioned in the above-quoted text. See Sellers' Brief at 20-23. The Fourth Circuit rightfully noted that these House Reports "naturally" mention Section 1983, because Section 1983 "supplies disabled children and their parents or guardians with a private right of action *for constitutional violations*." A18 (emphasis added). As a result, there is no evidence of Congressional intent to allow Section 1983 claims for alleged IDEA violations.

The Fourth Circuit's decision makes even more sense considering that this Court held, in Smith v.

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[10] The quoted language is from the 1986 amendments. This version added Constitutional and Rehabilitation Act claims as claims that may be brought regardless of the IDEA's remedial scheme. The 1997 reauthorization added claims brought under the Americans with Disabilities Act to the list. See 20 U.S.C. § 1415(l).

Robinson, 468 U.S. 992, 1020 (1984), that the omission of a damages provision in the IDEA was ". . . in response to Congress' awareness of the financial burden already imposed on States by the responsibility of providing education for handicapped children." Congress has not amended the law to expressly provide for a monetary damages remedy. The Sellers should not be allowed to do indirectly -- sue under Section 1983 to obtain money damages -- what they cannot do directly under the IDEA.

2. Congress Has Not Unambiguously Prohibited Section 1983 Claims for Alleged IDEA Violations, as Required by the Spending Power.

The IDEA is a joint federal-state program enacted under Congress' spending power. Commonwealth of Virginia Dep't of Educ. v. Riley, 106 F.3d 559, 561 (4th Cir. 1997) (en banc). Under the IDEA, a State receives federal money in exchange for its agreement to provide procedural protections and educational services to students with disabilities who are eligible to receive services. Board of Educ. v. Rowley, 458 U.S. 177, 179 (1982). Any enactment pursuant to the spending power is contractual in nature and must be expressed in an unambiguous manner.

> Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on

> whether the State voluntarily and knowingly accepts the terms of the "contract". There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, *if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously*.

See Pennhurst State Sch. v. Halderman, 451 U.S. 1, 17 (1981) (citations omitted) (emphasis added). The Fourth Circuit has applied this spending power analysis to the IDEA and held that

> language which, at best, only implicitly conditions the receipt of federal funding on the fulfillment of certain conditions is insufficient to impose on the state the condition sought.

Commonwealth of Virginia Dep't of Educ. v. Riley, supra at 561.[11]

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[11] In their brief, the Sellers unsuccessfully try to distinguish Riley. Sellers' Brief at 19. The Riley Court concluded that the federal government could not require Virginia to provide educational services to special education students who were suspended and expelled for misconduct which was not caused by their disability when this requirement was not expressed in the IDEA and was only arguably "implicit" in the law. Commonwealth of Virginia

The Fourth Circuit correctly held that § 1415(f) "fails to state, or even imply, that Section 1983 suits may be brought for IDEA violations. Instead, it pointedly omits 42 U.S.C. § 1983 from its list of statutes. This omission is significant." A20. Thus, there is no express contractual authority for acceptance by the School Board of Section 1983 liability.

The Sellers rely primarily on Matula, supra, for the proposition that the IDEA authorizes Section 1983 causes of action based on violations of the IDEA. This reliance is in error for two reasons. First, the Matula Court ignored the fact that Section 1983 is not mentioned in the IDEA's list of statutes. Second, the Matula Court discussed the legislative history as though it explicitly allows a Section 1983 action based on an alleged IDEA violation. Matula, supra at 494. The Sellers Court correctly pointed out that the legislative history does not explicitly approve such actions. Thus, the Matula Court's decision is in error.[12]

Dep't of Educ. v. Riley, supra at 561; see also, Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589, 603 n.8 (4th Cir. 1997).

[12] The majority of appellate courts deciding this issue has refused to allow Section 1983 suits based on alleged violations of the IDEA. See, e.g., Crocker v. Tennessee Secondary Sch., supra, at 387. Charles F. v. Board of Educ. of Skokie Sch. Dist., supra; Heidemann v. Rother, supra at 387. The most recent pronouncement came in an unpublished opinion rendered by the Ninth Circuit. See Shevtsov, supra at *5-6 ("There is no authority supporting

D. THE SELLERS HAVE NOT STATED A CLAIM UNDER SECTION 1983.

The Sellers have not alleged even the minimal elements for recovery under Section 1983. There is no allegation that any actions of either Respondent denied Kris' rights secured to him by statute. Specifically, there are no allegations in the complaint that either of the Respondents took any steps themselves to deny Kris access to a special education program. The IDEA provides that a team determines whether a student is identified as disabled. 20 U.S.C. § 1415(a)(4). The School Board and the Superintendent were not alleged to be a part of that team.

There are also no allegations that either the School Board or the Superintendent knew of the denial of special education services.[13] Respondeat superior theories do not apply in these situation. Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 689 (1978); Bryan County Comm'r v. Brown, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626, 639 (1997). Thus, neither Respondent has

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the imposition of [punitive damages and damages for pain and suffering] under the IDEA, or, derivatively, under 42 U.S.C. § 1983.").

[13] The Sellers' statements in their brief, p. 22, that the school principal was "aware of, and participated in, the school's violation of the IDEA," or that Kris' rights were denied by "actions by the school, with the knowledge and participation of those in positions of authority" are not in the record.

Section 1983 liability under the facts as alleged.[14] There is no showing that either was a moving force in taking the action to deny Kris special education services. Id.

CONCLUSION

For the reasons stated above, the School Board of the City of Manassas, Virginia, and James E. Upperman, Superintendent, request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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[14] In any event, it would also appear that the Superintendent would be entitled to good faith immunity under the circumstances of this case. See Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982). Of course, the School Board is immune from punitive damages. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).